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In The

Supreme Court of the United States

BLAINE COUNTY, MONTANA; DON K. SWENSON, ARTHUR KLEINJAN, and MARY DELORES PLUMAGE, in their official capacities as members of the Blaine County Board of Commissioners; and SANDRA BOARDMAN, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County,

Petitioners,

v.

UNITED STATES of America,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

J. SCOTT DETAMORE, ESQ.
Counsel of Record
WILLIAM PERRY PENDLEY, ESQ.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the enactment of Section 2 of the Voting Rights Act (VRA) constitutes a constitutional exercise of Congress' power under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments as applied to at-large voting in political subdivisions not covered by Section 5 of the VRA?

2. Whether an alleged violation of Section 2 of the VRA requires proof:

a. That a minority group has been denied the equal opportunity both to participate in the political process and to elect its candidates of choice?

b. That a causal connection exists between past or present purposeful discrimination and the minority group's lack of opportunity to participate in the political process and to elect candidates of its choice?

c. That the minority group is politically cohesive because it possesses distinctive and unique political interests that can be addressed by the election of its candidate of choice to the political body in question?

LIST OF PARTIES

Petitioners were Defendants in the U.S. District Court for the District of Montana, except that Victor J. Miller, a county commissioner originally named was replaced in January 2003, by Mary Delores Plumage. Joseph F. McConnell, Franklin R. Perez, Candace D. De Celles, Cheryl Sears, Wesley D. Cochran, Linda M. Buck, Donald L. Long Knife, Daniel Kinsey, and the Fort Belknap Community Council were denied intervention on the merits but granted intervention in the remedy phase. They did not participate in the appeal.

CORPORATE DISCLOSURE STATEMENT

Because petitioners are a county and its officers in their official capacities a corporate disclosure statement is not required by Supreme Court Rule 29.6.

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OPINIONS BELOW

Blaine County, Montana seeks review of the opinion of the U.S. Court of Appeals for the Ninth Circuit. *U.S. v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004); App. 1-36. The Ninth Circuit's Order denying Blaine County's Petition for Rehearing *En Banc* is reproduced at App. 79. Findings of Fact and Conclusions of Law and Order of the U.S. District Court for the District of Montana, neither reported nor appearing in Westlaw, District Court No. CV-99-0122-PMP (D. Mont. Mar. 21, 2002), is reproduced at App. 37-63. The accompanying Judgment of the District Court is reproduced at App. 64-65. The Order by the U.S. District Court for the District of Montana denying Blaine County's Motion for Summary Judgment, 157 F.Supp.2d 1145 (D. Mont. 2001), is reproduced at App. 66-78.

JURISDICTION

The opinion for which review is sought was entered on April 7, 2004, and the Order denying Blaine County's Petition for Rehearing *En Banc* of that decision was entered on September 7, 2004. Pursuant to Supreme Court Rule 13.3, this Petition is filed timely within 90 days of the entry of that latter Order. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the judgment of the Ninth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth and Fifteenth Amendments to the U.S. Constitution (App. 80-81) are involved in this case.

STATUTORY PROVISIONS INVOLVED

Section 2 of the VRA (42 U.S.C. § 1973) (App. 82); Section 4 of the VRA (42 U.S.C. § 1973b) (App. 83-93); and Section 5 of the VRA (42 U.S.C. § 1973c) (App. 93-95) are involved in this case.

STATEMENT OF THE CASE

Blaine County, Montana is a rural county in north-central Montana, bordering Canada. It is approximately 60 miles east to west and 90 miles north to south, consisting of approximately 4,638 square miles. It is the ninth largest of Montana's 56 counties. Within the southeastern quadrant of Blaine County is the Fort Belknap Reservation, some small part of which carries over into neighboring Phillips County to the east. Approximately 83 percent of the American Indians who live in Blaine County reside within the boundaries of that Reservation. Although members of the Assiniboine native people and the Gros Ventre native people reside there, the federally recognized tribe to which members of both groups have been assigned by the United States Government is the Fort Belknap Tribe.

According to the 2000 Census, the total population of Blaine County is 7,009, of which 3,180 are "American Indians," constituting 45.4 percent of the total population,

while 3,685 are "White," constituting 52.6 percent of the total population. American Indians of voting age, that is, over 18 years, number 1,834, constituting 38.8 percent of the voting age population (VAP), whereas Whites number 2,805, constituting 59.4 percent of the VAP. Figures available at the time of trial indicate that Blaine County is economically the poorest county in the nation's poorest State.

Prior to June 17, 2002, in accordance with Montana Statute, Blaine County's Board of Commissioners was comprised of three full-time commissioners, each of whom was required to reside in a different residential district, elected for six-year staggered terms with one commissioner being elected every even-numbered year in November, coinciding with federal elections. Though the commissioners must each reside in different residential districts, they are required to be elected at-large, by a majority vote. The two political parties in the County, the Republican and the Democrat, conduct primary elections in June, which are also at-large elections in which the plurality winner advances to the November general election. Democrat candidates dominate Blaine County Commissioner elections.

On November 16, 1999, the United States filed suit in the U.S. District Court for the District of Montana against Blaine County, Montana, its County Commissioners, and its Clerk and Recorder, in their official capacities, alleging that Blaine County's at-large election of County Commissioners violated Section 2 of the VRA and requesting the creation of a majority-minority single member district. On January 3, 2000, Blaine County answered. On January 31, 2001, Blaine County filed its Motion for Summary Judgment, seeking a declaration that Section 2 of the VRA is

unconstitutional facially and as applied, which was denied on August 1, 2001. Meanwhile, on February 28, 2001, the Fort Belknap Tribe and individual American Indian voters had moved to intervene, which motion was denied with regard to the merits of this case, but was later allowed regarding the remedy.

This case was tried to the Court from October 9, 2001, through October 18, 2001. On March 21, 2002, the District Court ruled for the United States and ordered Blaine County to present a plan of remediation. That plan was prepared by Blaine County, and ordered implemented on June 17, 2002, thus creating three single member districts with one super-majority American Indian District, from which Commissioner Plumage was elected in November 2002. On July 12, 2002, Blaine County filed its Notice of Appeal of the merits, but not of the remedy, and of the denial of its Motion for Summary Judgment. The District Court's rulings were affirmed by the Ninth Circuit on September 7, 2004; Blaine County's Motion for Rehearing *En Banc* was denied on April 7, 2004. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. WHETHER SECTION 2 IS CONSTITUTIONAL AS APPLIED HERE IS AN EXTREMELY IMPORTANT QUESTION OF FEDERAL LAW WITH FAR-REACHING FEDERALISM IMPLICATIONS THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Ninth Circuit's holding that it was bound by this Court's summary affirmance in *Mississippi Republican Party v. Brooks* conflicts with the Second Circuit Court of Appeals.

Whether Section 2 of the VRA, which prohibits facially neutral at-large elections in political subdivisions not covered by Section 5, is constitutional has not been decided by this Court.

This Court summarily affirmed *Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984), which found that Section 2 is facially constitutional, in *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984). The Ninth Circuit held that it was bound by that decision. *Blaine County*, 363 F.3d at 904; App. 10-11. The Ninth Circuit conceded that, if intervening doctrinal developments suggested that reliance on *Brooks* is no longer warranted, it would not be bound (App. 11), but held that "there have been no [such] doctrinal developments." *Id.* at 904; App. 12. By so ruling, the Ninth Circuit ignored the "doctrinal developments" set out in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny (*Boerne* through *Lane*).[1]

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[1] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Kimel v. Florida Board of*

(Continued on following page)

The Second Circuit, however, followed *Boerne* through *Lane*, holding that "[t]he [Supreme] Court has since 1997 introduced an entirely new framework for analyzing the scope of Congress' power under Section 5 of the Fourteenth Amendment." *Muntaqim v. Coombe*, 366 F.3d 102, 119 (2d Cir. 2004); *cert. denied*, 2004 WL 2072975 (No. 04-175, Nov. 8, 2004). In those cases, "the Court introduced a standard that is 'more rigorous than the standard of review applied in earlier Section Five [of the Fourteenth Amendment] cases, such as *Katzenbach v. Morgan*.'" *Id.* at 120. *See also Farrakhan v. Washington*, 359 F.3d 1116, 1124 (9th Cir. 2004) (Kozinski, J. dissenting from denial of rehearing *en banc*) ("Despite a 1984 case [citing *Brooks*] summarily affirming a district court decision upholding its constitutionality . . . Section 2's constitutionality remains an open question.").

Moreover, members of this Court have cautioned that Section 2's constitutionality remains an open question: *Johnson v. De Grandy*, 512 U.S. 997, 1028-1029 (1994) (Kennedy, J. concurring in part and in judgment); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J. dissenting). *See also Bush v. Vera*, 517 U.S. 952 (1996) (O'Connor, J. concurring) ("In the 14 years since enactment of § 2(b) . . . [we have] never directly addressed its constitutionality"). *Id.* at 991; *and, generally*, *Holder v. Hall*, 512 U.S. 874, 891-945 (1994) (Thomas, J. concurring, joined by Scalia, J.).

Regents, 528 U.S. 62 (2000); *U.S. v. Morrison*, 529 U.S. 598 (2000); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); and *Tennessee v. Lane*, ___ U.S. ___, 124 S.Ct. 1978 (2004).

B. Whether Congress exceeded its authority under the Enforcement Powers is a critical issue implicating the foundation of Federalism set out in the U.S. Constitution.

The federal government is a "government of enumerated powers." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). Thus, States retain sovereignty over matters not so delegated. This "residual state sovereignty [is] implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" *Printz v. U.S.*, 521 U.S. 898, 919 (1997). "[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are . . . overridden by the power to enforce the Civil War Amendments by 'appropriate legislation.'" *City of Rome v. U.S.*, 446 U.S. 156, 179 (1980). But "[l]egislation which alters the meaning [of those Amendments] cannot be said to be enforcing [those] Clause[s]." *Boerne*, 521 U.S. at 519. "[T]he Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Oregon v. Mitchell*, 400 U.S. 112, 124-125 (1970) (Black, J., announcing the judgment of the Court). Thus, when Congress does not "enforce" those Amendments, but rather defines them, it impinges on powers reserved to the States, violating the Constitution and principles of federalism incorporated therein.

This Court should grant this Petition to answer this "open question" and to decide whether Congress has impinged on the sovereignty of the States by exceeding the

powers conferred by the Fourteenth and Fifteenth Amendments in amending Section 2 of the VRA.

II. THE NINTH CIRCUIT'S ANALYSIS OF CONGRESSIONAL POWER UNDER THE ENFORCEMENT CLAUSES OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. Section 2 of the VRA is "prophylactic legislation" because it proscribes facially neutral conduct.

The Fourteenth and Fifteenth Amendments prevent only purposeful, invidious discrimination by state actors. *City of Mobile Alabama v. Bolden*, 446 U.S. 55, 65 (1980). "Congress' power under § 5 . . . extends only to 'enforcing' the provisions of the Fourteenth Amendment," a power that is solely "remedial." *Boerne*, 421 U.S. at 519. "Congress' § 5 authority is appropriately exercised only in response to state transgressions" of the Constitution. *Garrett*, 531 U.S. at 368. Hence, facially neutral at-large elections violate the Fourteenth and Fifteenth Amendments only if adopted or maintained for the invidious purpose of diluting the voting strength of minority voters. *Bolden*, 446 U.S. at 66.

In 1982, in direct response to *Bolden*, Congress amended Section 2 and prohibited at-large elections that purportedly dilute the voting strength of minority groups, thereby proscribing facially neutral conduct. *Boerne* through *Lane* set forth the tests applied by this Court to determine whether such a prophylactic enactment is "appropriate legislation" as that term is used in the

Enforcement Clauses of the Fourteenth and Fifteenth Amendments.

B. Prophylactic legislation must be a congruent and proportionate response to an identified history of a widespread pattern of purposeful discrimination.

For prophylactic legislation to be "appropriate legislation" to enforce the Fourteenth and Fifteenth Amendments, "there must be congruence and proportionality between the means used and the needs to be achieved." *Boerne*, 521 U.S. at 530. The "appropriateness of remedial measures must be considered in light of the evil presented." *Id.* "[T]he constitutional propriety of [such legislation] must be judged with reference to the historical experience it reflects." *Id.* at 525.

Thus, prophylactic legislation is "appropriate when there is reason to believe that the laws affected by the congressional enactment have a significant likelihood of being unconstitutional" given the "historical experience" of past unconstitutional discrimination that it "reflects." *Id.* at 532. Thus, where "'jurisdictions with a demonstrable history of intentional racial discrimination create the risk of purposeful discrimination,' Congress could 'prohibit changes that have a discriminatory impact' in those jurisdictions." *Id. Accord Florida Prepaid*, 527 U.S. at 647.

Therefore, Congress cannot enact "appropriate" Section 5 legislation unless it has "identified a history and pattern of unconstitutional State transgressions." *Garrett*, 531 U.S. at 368. When dealing with a nationwide prophylactic remedy, Congress must identify a history of "widespread and persisting deprivation of constitutional rights" that

the legislation is aimed at preventing. *Florida Prepaid*, 527 U.S. at 64 (citing *Boerne*, 521 U.S. at 526); *accord Morrison*, 529 U.S. at 626-627; *Garrett*, 531 U.S. at 368).

For example, *Morrison* held that the Violence Against Women Act was "different from the previously upheld remedies in that it applies uniformly throughout the Nation," 529 U.S. at 626, instead of being "directed only to the State where the evil found by Congress existed" or "directed only to the States in which Congress found that there had been [unconstitutional] discrimination." *Id.* 627. *Morrison* found that the conduct complained of "does not exist in all the states, or even most states." *Id.*[2] *Accord Hibbs,* which found that Congress had identified a widespread pattern of unconstitutional gender stereotyping among "the States," *Hibbs*, 538 U.S. at 730, which is a "nationwide problem" that "Congress had already tried unsuccessfully to address," which was "difficult and intractable" and regarding which "previous legislative attempts had failed." *Id.* at 737.[3]

Properly summarized, the "three-part 'congruence and proportionality' test[,] established in *Boerne* [through *Lane*]," requires that a reviewing court:

> (1) identify "with some precision the scope of the constitutional right at issue," *Garrett*, 531

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[2] Evidence regarding 21 States was not sufficient for nationwide application. *Id.* at 665-666 (Breyer, J. dissenting).

[3] Likewise, *Lane* held that "Congress learned that many individuals in many States across the country, were being excluded from courthouses . . . by reason of their disabilities," *Lane*, 124 S.Ct. at 1990, revealing "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 1988-89.

> U.S. at 365; (2) determine whether Congress identified a history and pattern of unconstitutional conduct by the States; and (3) if so, analyze whether the statute is an appropriate, congruent and proportional response to that history and pattern of unconstitutional treatment. *Garrett*, 531 U.S. at 374; *see Boerne*, 521 U.S. at 520.

Miller v. King, 384 F.3d 1248, 1269 (11th Cir. 2004).

C. The Ninth Circuit ignored *Boerne* through *Lane* and created its own tests.

Even though it held that it was bound by *Brooks*, the Ninth Circuit considered the constitutionality of Section 2 and found it facially constitutional. *Blaine County*, 363 F.3d at 905-909; App. 13-22.[4] In doing so, however, the Ninth Circuit did not employ the analysis required by *Boerne* through *Lane*, but instead placed primary reliance on *City of Rome v. United States*, *supra* (upholding Section 5's results test for retrogressive voting changes in jurisdictions subject to Section 5); *Oregon v. Mitchell*, *supra* (upholding a nationwide ban on literacy tests); *U.S. v. Marengo County Commission*, 731 F.2d 1546 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); and *Major v. Treen*, 574 F.Supp. 325 (E.D. La. 1983). *Blaine County*, 363 F.3d at 908-909; App. 19-22. All were decided prior to *Boerne*. As a result the Ninth Circuit

[4] The Ninth Circuit mischaracterized Blaine County's argument. Blaine County did not contend that Section 2 is facially unconstitutional because it is overinclusive, but rather that Section 2 is unconstitutional as applied to at-large voting in political subdivisions not covered by Section 5.

created its own tests that conflict with this Court's decisions in *Boerne* through *Lane* and the Eleventh Circuit's decision in *Miller v. King, supra*.

1. The Ninth Circuit failed to identify the scope of the constitutional right at issue.

The Ninth Circuit refused to identify the scope of the constitutional right targeted by Section 2.

2. The Ninth Circuit held that a history of unconstitutional conduct by the States is irrelevant.

The Ninth Circuit held that no examination of the history before Congress of alleged unconstitutional conduct by the States was necessary because "section 2 'avoids the problem . . . entirely by its own self-limitation' [rendering] nationwide application of this provision [] undoubtedly constitutional. Sen. Rep. No. 97-417 at 43 (1982)."[5] *Blaine County*, 363 F.3d at 906; App. 16. Essentially, the Ninth Circuit held that, by the application of the totality of circumstances test, Section 2 prohibits only at-large election systems that violate the Fourteenth or Fifteenth Amendments. Thus, the Ninth Circuit conflicts with *Bolden*, which held that the application of those factors does not establish the intent required for a finding

[5] Sen. Rep. No. 97-417, 97th Congr., 2d Sess. 1982, reprinted in 1982 U.S.C.C.A.N. 177.

of unconstitutionality. *Bolden*, 446 U.S. at 71-72.[6] Moreover, the Ninth Circuit's ruling conflicts with *Boerne* through *Lane*.

3. The Ninth Circuit held that upholding a nationwide ban on literacy tests *a fortiori* renders Section 2 constitutional.

The Ninth Circuit held that, because Section 2's totality of the circumstances test renders Section 2 "more limited than the nationwide literacy test ban upheld in *Mitchell*," *Mitchell* is dispositive of Section 2's constitutionality. *Blaine County*, 363 F.3d at 906; App. 16. This analysis ignores the requirements of *Boerne* through *Lane* that a court must analyze the nature and extent of the history of unconstitutional conduct identified by Congress, not simply analogize to a purportedly similar remedy that was upheld.

Moreover, in upholding the ban on literacy tests, this Court searched for and found the type of evidence the Ninth Circuit refused to seek out here. Specifically, this Court found that Congress had determined that "the inevitable effect of [literacy tests is to] den[y] the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education." *Mitchell*, 400 U.S. at 235 (Brennan concurring). Congress found that literacy tests "are vague, arbitrary, hypertechnical or unnecessarily difficult, and have little, (if any), bearing upon the capacity

[6] The Ninth Circuit's holding is even more problematic in light of its holding that only two of the nine tests in the totality of the circumstances test need be proved. See discussion Section III.

to cast an intelligent ballot," leading Congress to determine that "[t]he inescapable conclusion is that these tests were not conceived as and are not designed to be bona fide qualifications in any sense but are intended to deprive Negroes of the right to register to vote." H.R. No. 89-439, 89th Cong., 1st Sess. 1965, reprinted in 1965 U.S.C.CA.N. 2437 at 2444. Furthermore, there is "a fundamental distinction between State action that inhibits an individual's right to vote and State action that affects the political strength of various groups that compete for leadership in a democratically governed community." *Bolden*, 466 U.S. at 83 (Stevens, J. concurring).[7]

The Ninth Circuit's analysis also conflicts with that of the Second Circuit in *Muntaqim*, 366 F.3d at 124-125, which applied the proper analysis. There, the Court held that "by banning *all* [race] neutral devices that 'interact with social and historical conditions to cause inequality,'" Congress, by enacting Section 2, "chose a blunt tool to address the problem it identified," which was the "use of various dilution schemes by certain states to avoid the strictures of the VRA." *Id.* at 124-125 (emphasis in original) *Muntaqim* held that, as applied to felony disenfranchisement laws, Section 2 is constitutionally "too attenuated" because of its "prohibition of *any* felony disenfranchisement law enacted at *any* time in *any* state that 'results' in

[7] "That distinction divides ... into two different categories 'governed by entirely different constitutional considerations.'" *Id.* at 83. "In the first category are poll taxes and literacy tests that deny individuals access to the ballot." *Id.* In the other category is Section 2, which "draws into question a political structure that treats all individuals as equals but adversely affects the political strength of a racially identifiable group." *Id.* at 84.

the abridgement of the right to vote on account of race." *Id.* at 125 (emphasis in original)

The Ninth Circuit's ruling conflicts with this Court's rulings in *Boerne* through *Lane* and the Second Circuit's ruling in *Muntaqim*.

4. The Ninth Circuit, while purporting to do so, did not analyze any history of nationwide voting discrimination.

The Ninth Circuit held that even if it were required to inquire into legislative history, "Congress had sufficient evidence of discrimination in jurisdictions not covered by Section 5 to warrant a nationwide application" of Section 2. *Blaine County*, 363 F.3d at 907; App. 17. The Ninth Circuit relied on a single statement from the 1982 Senate Report and the Eleventh Circuit's pre-*Boerne Marengo County* decision. First, the Ninth Circuit quoted from Sen. Rep. 97-41 at 42, n. 16:

> The hearing record before this committee and the House committee includes testimony as to the existence of discriminatory practices outside the covered jurisdictions, including cases already adjudicated against various non-covered jurisdictions.

Blaine County, 363 F.3d at 907; App. 17. Thus, the Ninth Circuit relied "entirely [on] [an] isolated sentence[] clipped from . . . [a] legislative report[]," a practice soundly condemned by this Court in *Kimel*, 528 U.S. at 89.

In *Marengo County*, the Eleventh Circuit held that "Congress did find evidence of substantial discrimination outside [covered] jurisdictions," relying on the same

solitary legislative statement as the Ninth Circuit did here. *Marengo County*, 731 F.2d at 1559. Based on this faulty foundation, the Ninth Circuit concluded:

> In sum, "Congress [had] explored with great care the problem of racial discrimination in voting," *Garrett*, 431 U.S. at 373, and established an "undisputed record of racial discrimination." *Fla. Prepaid*, 527 U.S. at 640. . . . Thus, we conclude that Congress did not exceed its Fourteenth and Fifteenth Amendment enforcement powers by applying section 2 nationwide.

Blaine County, 363 F.3d at 907; App. 17-18.

Had the Ninth Circuit, in accordance with *Boerne* through *Lane*, properly examined the history on which Congress relied, it would have found that there was no evidence of a widespread pattern of purposeful voting discrimination outside jurisdictions subject to Section 5 of the VRA. In fact, voting discrimination outside jurisdictions subject to Section 5 was virtually ignored:

> Because Section 2 applies in scope to the entire Nation, there is the necessity of demonstrating that the "exceptional" circumstances found in *Katzenbach* to exist in the covered jurisdictions in fact permeated the entire Nation. . . . There has been *no such evidence offered during either the House or Senate Hearing*. Indeed, the subject of *voting discrimination outside the covered jurisdictions has been virtually ignored* during the hearings in each chamber. . . . In the *total absence of such evidence*, it is impossible for Congress to seriously contend that the permanent, nationwide change proposed in the standard for identifying civil rights violations is a "remedial" effort.

Sen. Rep. No. 97-417 at 171 (Report of Subcommittee on the Constitution) (emphasis supplied).

Moreover, assuming *arguendo* that a widespread pattern of purposeful discrimination in voting had been identified in Section 5 covered jurisdictions, the extremely limited number of such jurisdictions fails to demonstrate a similar pattern in non-covered jurisdictions. There are only nine covered States: Alaska, Arizona, Texas, Louisiana, Mississippi, Alabama, Georgia, South Carolina and Virginia.[8] These are confined to one region of the country, the Deep South, except Arizona and Alaska, which were covered in 1975. *Id.*[9] While "confine[ment] to those regions of the country where voting discrimination had been most flagrant" is not necessarily essential in all cases, such "limitations ... tend to ensure Congress' means are proportionate to ends legitimate ... ." *Boerne*, 521 U.S. at 532-533. Lack of such confinement or other narrow tailoring "is particularly incongruous" when there is, as here, "scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Florida Prepaid*, 527 U.S. at 646.

With such scant support here for application beyond a few southern States, it "simply cannot be said that many of the acts of infringement affected by the congressional enactment [in jurisdictions not subject to Section 5] have a significant likelihood of being unconstitutional." *Id.* *Accord Farrakhan*, 359 F.3d at 1123 (Kozinski, J. dissenting) ("Enforcement legislation should be geographically

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[8] App. 96-102 (http://www.usdoj.gov/crt/voting/sec_5/covered.htm). Three counties in Virginia have "bailed out." *Id.*

[9] A few covered counties exist in seven additional States. *Id.*

targeted when the threat of violation varies from place to place.") (citing *Morrison*).

Thus, there is simply no historical support for the proposition that at-large voting in jurisdictions not subject to Section 5 is substantially likely to have been adopted or maintained to discriminate against racial minority groups. The Ninth Circuit's failure to so rule, given the nonexistent historical record, places it in conflict with this Court's rulings in *Boerne* through *Lane*.

D. The Ninth Circuit ruled that *City of Rome* is dispositive of the constitutionality of Section 2.

The Ninth Circuit, relying on *City of Rome* held that "Section 5 of the VRA could constitutionally be applied to electoral procedures that only had discriminatory results and were not motivated by discriminatory intent" because "requiring proof of intent would cause 'the perpetuation of earlier, purposeful racial discrimination regardless of whether the practices they prohibited were discriminatory only in effect.'" *Blaine County*, 363 F.3d at 907-908; App. 18-19. Therefore, the Ninth Circuit concluded that "[i]f section 5's results test is constitutional, the same must be true of section 2's results test." *Id.* at 908; App. 19.

This holding places the Ninth Circuit in conflict with *Boerne* through *Lane*. This Court has distinguished *City of Rome* by explaining that *City of Rome* held only that "since 'jurisdictions with a demonstrable history of intentional racial discrimination . . . create the risk of purposeful discrimination,' Congress could [constitutionally] 'prohibit [voting] changes that have a discriminatory impact' in

those jurisdictions." *Boerne,* 521 U.S. at 532. However, because Section 2 applies nationwide to the adoption or maintenance of voting devices that have a discriminatory impact on account of race or color, irrespective of the history of the unconstitutional voting conduct of any particular jurisdiction, *City of Rome* has no application to Section 2. Section 2 must be upheld, if possible, not by application of *City of Rome*, but by application of *Boerne* through *Lane.*

E. The Ninth Circuit held that Congress' desire to avoid the difficulty and divisiveness of constitutional proof was sufficient justification for Section 2's enactment.

The Ninth Circuit held that Congress' motivation in adopting Section 2 was a sufficient basis for upholding the constitutionality of Section 2. *Blaine County*, 363 F.3d at 907-908; App. 17-18.

Congress had enacted Section 2 originally to mirror the Fifteenth Amendment and believed that Section 2, like the Fifteenth Amendment, did not require proof of purposeful discrimination, which Congress believed was difficult and divisive. Sen. Rep. 97-417 at 36-37. *Bolden*, which Congress believed had been decided wrongly, required such proof. *Bolden*, 446 U.S. at 66. Therefore, Congress sought to return the constitutional analysis to what it believed had been in effect before *Bolden*:

> This amendment is designed to . . . *restore*[] the legal standards, based on the *controlling Supreme Court precedents . . . prior to* the litigation involved in *Mobile v. Bolden.*

Sen. Rep. 97-419 at 2. (emphasis supplied).

Sen. Rep. 97-417 at 36-37, on which the Ninth Circuit relied, establishes that Congress amended Section 2 because it believed that proving that at-large voting was adopted or maintained to dilute minority voting strength was difficult and divisive, not because it possessed a history demonstrating that at-large voting was substantially likely to be unconstitutional:

> The main reason [for enacting the 1982 amendment] is that . . . the *[constitutional] test asks the wrong question* . . . [I]f an electoral system operates today to exclude blacks or Hispanics from a *fair chance* to participate, then the matter of what motives were in an official's mind . . . is of the most limited relevance.
>
> * * *
>
> Second, the Committee has heard persuasive testimony that the intent test is *unnecessarily divisive* because it involves charges of racism on the part of the individual officials or entire communities.
>
> * * *
>
> [3] Third, the intent test will be an *inordinately difficult burden* for plaintiffs in most cases. (emphasis supplied)

Boerne through *Lane* does not recognize difficulty, divisiveness, or subjective fairness of constitutional proof as a proper foundation for congressional enactment of prophylactic legislation. Congress may not prohibit facially neutral conduct simply because it believes that proving such conduct unconstitutional is difficult or divisive. Nowhere in the legislative history is there any discussion of evidence of purposeful discrimination in voting that even approaches that which was before Congress in 1965

or even in 1975. In amending Section 2, Congress interpreted the Fourteenth and Fifteenth Amendments as it thought *Bolden* should have. Under *Boerne* through *Lane*, Congress has no such power. Thus, the Ninth Circuit's holding to the contrary conflicts with *Boerne* through *Lane*.

This Court should grant this Petition to resolve this conflict.

III. THE NINTH CIRCUIT HELD THAT SECTION 2 DOES NOT REQUIRE PROOF OF A MINORITY GROUP'S UNEQUAL OPPORTUNITY TO PARTICIPATE IN THE POLITICAL PROCESS.

In enacting the 1982 amendment to Section 2, Congress intended to "codify" the "results test" applied in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). Sen. Rep. 97-417 at 2, 20-21, 28, 32-33 (1982).[10] Congress also sought to codify *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), which applied *Whitcomb* and *White*. *Id.* 23, 28, n.113. Thus, any Section 2 ruling must apply these cases. The Ninth Circuit did not. Instead, relying on a footnote in *Thornburg v. Gingles*, 478 U.S. 39, 47-48, fn. 15 (1986), the Ninth Circuit held:

> As *Gingles* explained, "the most important Senate Report factors bearing on § 2 challenges . . . are the 'extent to which minority group members

[10] "Congress . . . revised Section 2 to . . . establish as the relevant legal standard the 'results test' applied by this Court in *White v. Regester* . . . and by other federal courts before *Bolden*." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

> have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'" In fact, *Gingles* expressly stated that [the other] Senate factors "are supportive of but *not essential to*, a minority voters claim." (emphasis in original)

Blaine County, 363 F.3d at 915; App. 35. *See also Id.* at 903; App. 10. There are nine Senate Factors.[11] By holding that Senate Factors 2 and 7 alone, irrespective of the other factors, constitute proof of a Section 2 violation, the Ninth Circuit's ruling conflicts with *Whitcomb*, *White*, and *Zimmer*, and *Johnson v. De Grandy*, 512 U.S. 997 (1994) and *Georgia v. Ashcroft*, 539 U.S. 461 (2003), discussed below.[12] Specifically, the Ninth Circuit held that an unequal opportunity to elect a minority candidate, caused by racially polarized voting, was dispositive of a Section 2 violation. *Blaine County*, 363 F.3d at 915-916, *relying on Gingles*, 478 U.S. at 47-48.

Whitcomb, *White*, and *Zimmer* all incorporated by Congress into Section 2, held that, not only must white bloc voting "cancel out" a cohesive minority group's votes, but there must exist lack of equal opportunity to participate in the political process.[13] *Whitcomb* held that actionable vote

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[11] The so-called "Senate Factors" represent no more than an attempt by Congress to list some of the factors that it understood had been required by the Courts in *Whitcomb*, *White*, and *Zimmer*. Sen. Rep. 97-417 at 28-29. These factors are reproduced in App. 103-104.

[12] Factor 2 is racially polarized voting, whereas 7 is the extent of election of minority candidates.

[13] Relying on *Whitcomb*, Section 2 likewise requires proof that minority groups "have less opportunity than other members of the electorate to *participate in the political process* ***and*** *to elect* representatives of their choice." 42 U.S.C. § 1973(b). (emphasis supplied).

dilution was present in an at-large voting system only where there existed "evidence and findings" that minority voters "had less opportunity . . . than other [voters] to [both] *participate* in the political process *and elect* legislators of their choice:"

> The mere fact that one interest group or another . . . has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies, where, as here, there is no indication that this segment of the population is being denied *access* to the political system.

403 U.S. at 149, 154-155. (emphasis supplied) *White* and *Zimmer* required proof of both elements. 412 U.S. at 765, and 485 F.2d at 1306. Moreover, under Section 2, racially polarized voting and lack of minority candidate success, both relating to opportunity to elect, are only two of the nine factors identified by Congress. App. 103-104. The remaining seven factors, which must be examined pursuant to *Whitcomb*, *White*, and *Zimmer*, relate to opportunity to participate in the political process.

Furthermore, *Gingles*, upon which the Ninth Circuit relied, has been distinguished or overruled for its overemphasis on factors 2 and 7. Justice O'Connor sharply criticized the *Gingles* plurality for its narrow focus on the opportunity to elect, asserting that the "results test reflected in *Whitcomb* and *White* requires an inquiry into the extent of the minority group's opportunities to participate in the political processes." 478 U.S. at 98 (O'Connor, J. concurring in judgment). The Court must instead "adhere to the approach outlined in *Whitcomb* and *White* and followed with some elaboration in *Zimmer* and other cases in the Courts of Appeals prior to *Bolden*," *Id.* at 99, which requires "consider[ation of] all relevant factors

bearing on whether the minority group has 'less opportunity . . . to participate in the political process *and* to elect representative of their choice.'" *Id.* (emphasis in original).

Johnson v. De Grandy, *supra*, reaffirmed *Whitcomb* and *White* and adopted Justice O'Connor's concurrence in *Gingles*. *De Grandy* held that "lack of electoral success is [only] evidence of vote dilution[;] courts *must* examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." *Id.* 1011-1012 (citing Justice O'Connor in *Gingles*).

Finally, Justice O'Connor, writing for the majority in *Georgia v. Ashcroft*, *supra*, held that, in addition to "the ability of a minority group to elect a candidate," the "other highly relevant factor . . . is the extent to which a minority group's opportunity to participate in the political process" is impaired. *Id.* at 482 (citing O'Connor, J. in *Gingles* and *Whitcomb*, *White*, and *De Grandy*.).

This Court should grant this Petition to resolve this conflict.

IV. THE NINTH CIRCUIT HELD THAT PROOF OF PURPOSEFUL DISCRIMINATION IS IRRELEVANT.

The Ninth Circuit held that proof of purposeful discrimination "has no part in a vote dilution claim" because that "would be divisive[,] . . . would place an impossible burden on the Plaintiffs," and "is contrary to the plain language of section 2's results test." *Blaine County*, 363 F.3d at 912; App. 28. This holding conflicts

with the decisions of this Court and most of the other circuit courts to address this issue.

Whitcomb, White, and *Zimmer*, upon which Section 2 is premised, all required proof of invidious racial bias in the community, which bias interacts with at large voting to dilute the voting strength of a racial minority group. For example, *Whitcomb* required proof of "invidious discrimination . . . [resulting in] less opportunity . . . to participate in the political process. . . . " 403 U.S. at 149. *Accord White,* 412 U.S. at 768; *Zimmer*, 485 F.2d at 1306.

Likewise, *Gingles* requires interaction of at-large voting with "past purposeful discrimination" resulting in vote dilution of a minority group. *See also De Grandy*, 512 U.S. at 1013 (Court must determine whether "a history of persistent discrimination" combined with "bloc-voting behavior portended any dilutive effect."); *Ashcroft*, 539 U.S. at 490 ("The purpose of the VRA is to prevent discrimination in the exercise of the electoral franchise.").

The Second Circuit held that, although Section 2 does not require purposeful discrimination by a State actor in the adoption or maintenance of at-large voting, "it does not follow . . . that Congress . . . also eliminated *White's* requirement that a plaintiff prove that [at-large voting] interacts with racial discrimination in order to establish a [Section 2] claim." *Muntaqim*, 366 F.3d at 117. "In enacting [Section 2,] Congress' decision to retain the words 'on account of race or color' suggests 'a continuing concern for race-based motivation, at least within the electorate." *Id.* at 116. Thus, a violation of Section 2 "requires some demonstrable causal connections between [at-large voting] and purposeful racial discrimination," *Id.* at 118; that is, a "plaintiff must [prove] . . . that racial discrimination has

caused either vote denial or vote dilution," even though the adoption or maintenance of at-large voting was itself not "motivated by racial bias." *Id.*

The majority of the circuits that have considered this issue agree. A Section 2 violation requires evidence that "a combination of public activity and private discrimination have joined to make it virtually impossible for minorities to play a meaningful role in the electoral process." *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850-851 (5th Cir. 1993) (*en banc*).[14] Without proof of "private discrimination," "claims of vote dilution [are no more than] 'a euphemism for political defeat at the polls.'" *Id.* at 851. Section 2 "prohibits those voting systems that have the effect of allowing a community motivated by racial bias to exclude a minority group from participation in the political process." *Nipper v. Smith*, 39 F.3d 1494, 1514 (11th Cir. 1994) (*en banc*). If "the evidence shows the community is not motivated by racial bias . . . then a case for vote dilution has not been made." *Id.* at 1515-1516. Section 2 "explicitly retains racial bias as the gravamen of a vote dilution claim." *Id.* "When racial antagonism is not the cause of an electoral defeat . . . the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics." *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995). "Forcing courts to turn a blind eye to other causes of

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[14] The legislative history provides that Section 2 "confine[s] its application to actual racial discrimination," invalidating "only . . . those election[ ] laws where the court finds that discrimination has, in fact, been proved." Sen. Rep. No. 97-417 at 43.

majoritarian bloc voting . . . facilitates a back-door approach to proportional representation." *Id.*[15]

This Court should grant this Petition to resolve this conflict.

V. THE NINTH CIRCUIT HELD THAT WHETHER MINORITY GROUPS POSSESS UNIQUE OR DISTINCTIVE POLITICAL INTERESTS IS IRRELEVANT.

The Ninth Circuit held that "it is actual voting patterns, not subjective interpretations of a minority group's political interests, that informs the political cohesiveness analysis." *Blaine County*, 363 F.3d at 910; App. 24. Thus, the Ninth Circuit held that particularized or unique interests, addressable by the political body in question, are irrelevant to minority political cohesion, conflicting with this Court's decisions and those of other circuits.

To be politically cohesive, minority group voters must possess "*distinctive* minority group interests" that the "selection of a[n] [at-large] electoral structure thwarts." *Gingles,* 478 U.S. at 51 (emphasis supplied). *Accord Whitcomb,* 403 U.S. at 135, fn. 12:

> These [minority voters] [must] have *interests in those areas of substantive law* such as housing

[15] *Accord, Solomon v. Liberty County Commissioners*, 221 F.3d 1218, 1225 (11th Cir. 2000); *Goosby v. Town Board of Hemptstead, N.Y.*, 180 F.3d 476, 493 (2d Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000); *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992); *Milwaukee Branch of N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997); *Smith v. Salt River Project Agr. Imp. and Power District*, 109 F.3d 586, 595, 595, fn. 7 (9th Cir. 1997) (adopting *Nipper, supra.*).

> regulations, sanitation, welfare programs . . . garnishment statutes, and unemployment compensation, among others, which *diverge significantly from* the interests of *nonresidents of the Ghetto*. (emphasis supplied)

These political interests of minority voters must be "unique," that is, "interests not necessarily shared by other members of the community." *Id.* at 155. This Court "accepted the concept of particularized interests in *Whitcomb* and again in *White*, and in *Bolden*." Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment*, 34 Hastings Law Journal 1, 59 (1982) (cited favorably by *Gingles*, 478 U.S. at 51).

Thus, although "a statistical analysis of voting behavior is highly relevant to the issue of political cohesion, . . . experiences and observations of individuals involved in the political process" are not only "clearly relevant to the question of whether the group is politically cohesive," but such evidence is "required if the court is to identify the presence or absence of distinctive minority group interests." *Sanchez v. Bond*, 875 F.2d 1488, 1493-94 (10th Cir. 1989). *Accord N.A.A.C.P. v. City of Columbus, S.C.*, 850 F.Supp. 404, 418 (D. S.C. 1994), *aff'd* with modifications not relevant here, 33 F.2d 52 (4th Cir. 1994) ("[T]here is nothing to be thwarted" without "distinctive political interests."). Indeed, even the Ninth Circuit earlier agreed with this proposition. *Old Person v. Cooney*, 230 F.3d 1113, 1126 (9th Cir. 2000) (no need to consider elections if there is "no evidence to suggest that . . . these contests . . . actually touched on issues of heightened concern to the [minority] community.").

Section 2 requires political cohesion, not racial cohesion. It does not require election of a minority candidate to a body that cannot advance a purportedly disenfranchised minority group's distinctive political interests. Such a requirement constitutes no more than proportional representation of minorities, a form of political apartheid.

This Court should grant this Petition to resolve this conflict.

CONCLUSION

For all the above reasons, this Court should grant this Petition.

Respectfully submitted,

J. SCOTT DETAMORE, ESQ.
Counsel of Record
WILLIAM PERRY PENDLEY, ESQ.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Dated December 6, 2004

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363 F.3d 897

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
BLAINE COUNTY, MONTANA; Don K. Swenson, in his official capacity as a member of the Blaine County Board of Commissioners; Arthur Kleinjan, in his official capacity as a member of the Blaine County Board of Commissioners; Victor J. Miller, in his official capacity as a member of the Blaine County Board of Commissioners; Sandra Boardman, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County, Montana, Defendants-Appellants,
v.
Joseph F. McConnell; Franklin R. Perez; Candace D. De Celles; Cheryl Sears; Wesley D. Cochran; Linda M. Buck; Donald L. Knife; Daniel Kinsey; Fort Belknap Community Council, Plaintiff-Intervenors-Appellees.

No. 02-35691.

Argued and Submitted Nov. 4, 2003.
Filed April 7, 2004.

J. Scott Detamore, Lakewood, Colorado, for the appellants.

Lisa Wilson Edwards, United States Department of Justice, Washington, D.C., for the appellee.

Appeal from the United States District Court for the District of Montana; Philip M. Pro, District Judge, Presiding. D.C. No. CV-99-00122-PMP.

Before: WARDLAW, GOULD, and PAEZ, Circuit Judges.

PAEZ, Circuit Judge:

Section 2 of the Voting Rights Act prohibits any voting procedure that results in a denial of the right to vote. 42 U.S.C. § 1973. The United States brought this section 2 action against Blaine County alleging that the County's at-large voting system for electing members to the County Commission prevents American Indians from participating equally in the County's political process. The district court determined that section 2 was a constitutional exercise of Congress's powers under the Fourteenth and Fifteenth Amendments, and that Blaine County's at-large voting system violated section 2. In this appeal, Blaine County challenges both of those rulings.[1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I.

Blaine County, located in north central Montana, is vast and sparsely populated. Its 7,009 residents are spread out over 4,638 square miles, which places the County in the top 5 percent of counties nationwide in terms of size. American Indians constitute 45.2 percent of the population and 38.8 percent of the voting age population, while whites make up 52.6 percent of the population and 59.4 percent of the voting age population. The American Indian population is geographically concentrated with 80 percent of the County's American Indians residing on the Fort Belknap Reservation. Despite their geographic concentration, no

[1] Blaine County also argues that the district court improperly admitted the testimony of the United States's expert witnesses. Although we agree that the district court's evidentiary rulings were erroneous in one limited respect, we ultimately conclude that this error was harmless.

American Indian was ever elected to the Blaine County Commission under the at-large voting system.

That system worked as follows. The Blaine County Commission consists of three commissioners, each of whom must reside in one of three different residential districts. Each commissioner is elected by a majority vote of the entire county, not just by voters in the commissioner's residential district. The commissioners serve six-year staggered terms, such that each even-numbered year one commissioner stands for election.

The United States brought this action under section 2 and section 12(d) of the Voting Rights Act of 1965 challenging the County's at-large voting system. The United States sought a declaration that the existing at-large voting system violates section 2. The United States also sought an injunction to prevent the County from using at-large voting in future elections and to require the County to submit a new districting plan for the district court's approval.

The County moved for summary judgment on the ground that section 2 was unconstitutional because it exceeded the scope of Congress's powers to enforce the Fourteenth and Fifteenth Amendments. The district court ruled that section 2 did not exceed Congress's power and denied the motion. *See United States v. Blaine County,* 157 F.Supp.2d 1145 (D.Mont.2001).

The case then proceeded to a court trial. In its post-trial Findings of Fact and Conclusions of Law and Order, the district court determined that Blaine County's system of staggered at-large elections for County Commissioner violated section 2. The court found that American Indian voters were sufficiently geographically compact and

politically cohesive to elect a County Commissioner of their choice, but that Blaine County's white residents voted as a bloc to prevent American Indians from electing their preferred candidates. It then analyzed the totality of the local circumstances, and held that there was (1) a history of official discrimination against American Indians, (2) racially polarized voting, (3) voting procedures that enhanced the opportunities for discrimination against American Indians, (4) depressed socio-economic conditions for American Indians, and (5) a tenuous justification for the at-large voting system. Accordingly, the district court held that the totality of the circumstances weighed in favor of a section 2 violation.

The district court declared that the at-large voting system in Blaine County violated section 2, and enjoined the use of such an election system in the future. It also ordered the County to file an election plan that would remedy the section 2 violation. The district court subsequently adopted the County's proposed remedial plan, which provides for three single-member districts.[2] Blaine County does not appeal the remedy adopted by the district court. However, the County does appeal the district court's ruling that section 2 is constitutional and declaration that Blaine County's at-large voting scheme violated section 2.

II.

As originally enacted in the Voting Rights Act of 1965 ("VRA"), section 2 merely restated the prohibition contained

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[2] Voters in District 1, which has a majority American Indian voting age population (just over 87 percent), recently elected Blaine County's first American Indian County Commissioner.

in the Fifteenth Amendment.[3] The VRA's most sweeping provision was section 5, which required "covered" jurisdictions with a history of voting discrimination[4] to preclear any change in voting practices or procedures with the United States Department of Justice. 42 U.S.C. § 1973c (1965). The 1965 Act also banned literacy tests in covered jurisdictions, and permitted the federal government to appoint federal registrars and election observers. Shortly after the VRA's enactment, the Supreme Court held in *South Carolina v. Katzenbach* that Congress constitutionally enacted section 5, the limited ban on literacy tests, and the appointment of federal monitors pursuant to its power under the Fifteenth Amendment. 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

The VRA was first amended in 1970 when Congress made the ban on literacy tests nationwide for a five-year period. Although the Supreme Court had held in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959), that literacy tests were not unconstitutional *per se,* it upheld Congress's power to

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[3] Section 2 originally provided:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Pub.L. No. 89-110, tit. I, § 2, 79 Stat. 437 (1965).

[4] A jurisdiction was "covered" for purposes of section 5 if it used a literacy or other test for registering or voting and if less than half of its voting age population voted in the 1964 presidential election. The original covered jurisdictions were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and large parts of North Carolina. Daniel Hays Lowenstein and Richard L. Hasen, *Election Law: Cases and Materials* 35 (2d ed.2001).

enact the five-year nationwide ban on literacy tests. *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). Congress again amended the VRA in 1975, making the nationwide literacy test ban permanent and extending the VRA's protections to language minorities.

During the 1970s, voting rights lawsuits increasingly relied on section 2 to remedy voting discrimination. In a series of cases, the Supreme Court and lower courts interpreted section 2 to require plaintiffs to show under the totality of the circumstances that the challenged system operated "to cancel out or minimize the voting strength of racial groups." *White v. Regester,* 412 U.S. 755, 765, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *see also Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir.1973).

However, in 1980, the Court held in *City of Mobile v. Bolden* that Congress intended section 2 to regulate only conduct prohibited by the Fifteenth Amendment. 446 U.S. 55, 60-61, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Because the Fifteenth Amendment only prohibited intentional discrimination, a violation of section 2 required a showing that the challenged procedure was adopted with the intent to discriminate. *Id.* at 62, 100 S.Ct. 1490. That same day, however, the Supreme Court held in *City of Rome v. United States* that section 5's "ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting." 446 U.S. 156, 177, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Thus, although the Court interpreted section 2 of the VRA to prohibit only purposeful discrimination, the Court recognized Congress's

power to enact legislation that prevented voting procedures that had discriminatory results.

In response to *Bolden* and pursuant to its Fourteenth and Fifteenth Amendment enforcement powers, Congress amended section 2 to clarify that it was a results test. S.Rep. No. 97-417, at 15-16, 39 (1982), U.S.Code Cong. & Admin.News at 177, 192-93. Section 2, as amended by the 1982 Voting Rights Act, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b), as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

The Supreme Court applied section 2 to multimember districts in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In that case, the Court held that when plaintiffs challenge at-large voting schemes under section 2, they must prove at a minimum that "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 49, 106 S.Ct. 2752. Broken down, this test has three requirements, known as the "*Gingles* factors": (1) compactness; (2) cohesive minority voting; and (3) a bloc voting majority that can usually defeat the minority-preferred candidate. *Id.* at 50-51, 106 S.Ct. 2752.

If the plaintiff establishes these three factors, the court then must consider whether under the totality of circumstances the at-large voting system operates to prevent the minority group from participating equally in the political process and electing representatives of its choice. *Id.* at 44-46, 106 S.Ct. 2752. *Gingles* cited a non-exhaustive list of factors discussed in the Senate Report on the 1982 Amendments that courts should consider in assessing the totality of the circumstances:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 36-37, 106 S.Ct. 2752 (quoting S.Rep. No. 97-417 at 28-29, U.S.Code Cong. & Admin.News at 205-07).

The most important Senate factors in a section 2 challenge to multimember districts are factors 2 (the extent to which elections are racially polarized) and 7 (the extent to which minorities have been elected). *Id.* at 51 n. 15, 106 S.Ct. 2752. The Senate Report's "list of typical factors is neither comprehensive nor exclusive" and "there is no requirement that a particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 45, 106 S.Ct. 2752. Rather, the ultimate "question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." *Id.* (internal citations omitted). With this history in mind, we turn to the constitutionality of section 2.

III.

The County contends that Congress exceeded its enforcement powers under the Fourteenth and Fifteenth Amendments when it enacted the 1982 amendments to the VRA. We disagree.

A.

To begin with, Blaine County does not dispute that the Supreme Court summarily affirmed section 2's constitutionality in *Mississippi Republican Executive Committee v. Brooks,* 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984), affirming *Jordan v. Winter,* 604 F.Supp. 807, 811 (N.D.Miss.1984) (3-judge district court). Although the County concedes that the Supreme Court summarily

disposed of the same constitutional challenge that the County raises here,[5] it argues that this summary affirmance is not binding precedent for a federal appellate court.

This contention ignores the well-established rule that the Supreme Court's summary affirmances bind lower courts, unless subsequent developments suggest otherwise. *Hicks v. Miranda,* 422 U.S. 332, 344-45, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). The County suggests that summary dispositions have less precedential value than opinions. Although this is true in the sense that the Supreme Court is more willing to reconsider its own summary dispositions than it is to revisit its prior opinions, this principle does not release the lower courts from the binding effect of summary affirmances.[6] As the Court

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[5] The jurisdictional statement in *Mississippi Republican Executive Committee* specifically asked "[w]hether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." 469 U.S. at 1003, 105 S.Ct. 416 (Stevens, J., concurring).

[6] The Supreme Court opinion cited by the County for this proposition actually said:

> Although we have noted that our summary dismissals are to be taken as rulings on the merits in the sense that they rejected the specific challenges presented and left undisturbed the judgment appealed from, we have also explained that they do not have the same precedential value as does an opinion of this Court after briefing and oral argument on the merits. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action. . . .

Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 307, 118 S.Ct. 766, 139 L.Ed.2d 717 (1998). Thus, the Supreme Court was referring to the precedential value it accords its own summary dispositions, not denying the binding effect of summary dispositions on the lower courts.

itself has instructed, "inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise." *Miranda,* 422 U.S. at 344, 95 S.Ct. 2281.

There have been no doctrinal developments that suggest we should ignore the Supreme Court's summary affirmance of section 2's constitutionality. While it is true that the Supreme Court has, in a series of recent cases, adopted a congruence-and-proportionality limitation on Congressional authority, this line of authority strengthens the case for section 2's constitutionality. Indeed, in the Supreme Court's congruence-and-proportionality opinions, the VRA stands out as the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments. Most tellingly, when the Supreme Court first announced the congruence-and-proportionality doctrine in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), it twice pointed to the VRA as the model for appropriate prophylactic legislation. *Id.* at 518, 525-26, 117 S.Ct. 2157. The Court's subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act as the baseline for congruent and proportionate legislation. *See Nevada v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 1982, 155 L.Ed.2d 953 (2003) (highlighting the pattern of state constitutional violations that supported Congress's enactment of the VRA); *Bd. of Trs. v. Garrett,* 531 U.S. 356, 373-74, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (holding that "[t]he contrast . . . is stark" between the evidence supporting the VRA's enactment and the insufficient evidence of state discrimination against the disabled); *United States v. Morrison,* 529 U.S. 598, 626,

120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (pointing to the VRA as legislation that appropriately targeted state constitutional violations, rather than discrimination by non-state actors); *Fla. Prepaid v. Coll. Sav. Bank,* 527 U.S. 627, 638, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999) (comparing the lack of evidence of state patent infringements with the "undisputed record of racial discrimination confronting Congress in the voting rights cases"). In sum, "the Court [has] continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *Boerne,* 521 U.S. at 526, 117 S.Ct. 2157. Thus, the congruence-and-proportionality cases support, not undermine, the Supreme Court's summary affirmance of section 2's constitutionality in *Mississippi Republican Executive Committee,* of which we remain bound.

B.

Even if we were free to ignore the Supreme Court's summary affirmance, we would join all of the other "lower courts [that] have unanimously affirmed [section 2's] constitutionality." *Bush v. Vera,* 517 U.S. 952, 991, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (O'Connor, J., concurring).[7] Blaine County, however, offers two different reasons

[7] Justice O'Connor cited the following cases that have upheld section 2's constitutionality: *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1556-1563 (11th Cir.1984), *cert. denied* 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311; *Jones v. Lubbock,* 727 F.2d 364, 372-75 (5th Cir.1984); *Shaw v. Hunt,* 861 F.Supp. 408, 438 (E.D.N.C.1994) (3-judge district court), *aff'd in part, rev'd in part,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Prosser v. Elections Bd.,* 793 F.Supp. 859, 869 (W.D.Wis.1992) (3-judge district court); *Wesley v. Collins,* 605 F.Supp.

(Continued on following page)

for why section 2 lacks congruence and proportionality. It argues that there is no widespread evidence of purposeful voting discrimination that would justify nationwide application of section 2. It also contends that section 2's results test is impermissible because the Constitution only prohibits intentional discrimination. We consider each argument in turn.

1. Nationwide Application

The sweeping preclearance requirements of section 5 of the VRA only apply to jurisdictions with a recent history of using voting tests and devices to deny the right to vote. *See Katzenbach,* 383 U.S. at 328-331, 86 S.Ct. 803. The Supreme Court has looked favorably upon section 5's limited geographic scope in its congruence-and-proportionality cases. *See City of Boerne,* 521 U.S. at 533, 117 S.Ct. 2157. In light of section 5's limited geographic scope, the County contends that Congress exceeded its constitutional power by not placing similar geographic limitations on section 2 of the VRA and by failing to document a nationwide pattern of purposeful voting discrimination that would justify nationwide application of section 2. We disagree for several reasons.

First, legislation enacted under § 5 of the Fourteenth Amendment need not have geographic restrictions. *City of Boerne,* 521 U.S. at 533, 117 S.Ct. 2157 ("This is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions or egregious predicates."). Such

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802, 808 (M.D.Tenn.1985), *aff'd* 791 F.2d 1255 (6th Cir.1986); *Sierra v. El Paso Indep. Sch. Dist.,* 591 F.Supp. 802, 806 (W.D.Tex.1984); *Major v. Treen,* 574 F.Supp. 325, 342-49 (E.D.La.1983) (3-judge district court).

limitations only "tend to ensure" proportionality when Congress "pervasively prohibits constitutional state action." *Id.*

Unlike section 5 of the VRA, section 2 does not engage in such a pervasive prohibition of constitutional state conduct. The two sections of the VRA are dramatically different in scope. Section 5 is an extraordinary measure, which requires covered jurisdictions to submit every change in their voting procedures to the Department of Justice for preclearance. Section 5 thus places the burden of proof on the state or locality, not on the party challenging the voting procedure. *Katzenbach,* 383 U.S. at 328, 86 S.Ct. 803. Because section 5 imposes such a significant burden on state and local governments, Congress had reason to limit its application to jurisdictions with a recent history of pervasive voting discrimination.

Section 2 is a far more modest remedy. The burden of proof is on the plaintiff, not the state or locality. This burden is significant; Congress heard testimony that section 2 cases are some of the most difficult to litigate because plaintiffs must usually present the testimony of a wide variety of witnesses – political scientists, historians, local politicians, lay witnesses – and sift through records going back more than a century.[8] In contrast to section 5, section 2's results test makes no assumptions about a

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[8] *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong. 368 (1982) [hereinafter *"VRA Hearings"*] (statement of Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union Foundation) ("[W]e tried . . . virtually every kind of civil rights lawsuit there is . . . and there's no question that a vote dilution suit is the most difficult. . . . The optimum dilution suit, quite frankly, was nothing less than a presentation of the complete racial history of the jurisdiction.").

history of discrimination. Plaintiffs must not only prove compactness, cohesion, and white bloc voting, but also satisfy the totality-of-the-circumstances test. *Gingles,* 478 U.S. 30, 48-50, 106 S.Ct. 2752, 92 L.Ed.2d 25. Because section 2 "avoids the problem of potential overinclusion entirely by its own self-limitation," nationwide application of this provision is undoubtedly constitutional. S.Rep. No. 97-417, at 43 (1982) [hereinafter "1982 Senate Report"].

Second, the Supreme Court has upheld the VRA's nationwide ban on literacy tests, even though literacy tests are not *per se* unconstitutional. *Mitchell,* 400 U.S. at 112, 91 S.Ct. 260. Section 2 is more limited than the literacy test ban upheld in *Mitchell* because it does not label any procedure as impermissible *per se.* Rather, a procedure only fails section 2's test if, given the totality of the circumstances, it prevents minorities from participating effectively in the political process or electing candidates of their choice.

Third, after the Supreme Court's recent decision in *Nevada v. Hibbs,* it is clear that Congress need not document evidence of constitutional violations in every state to adopt a statute that has nationwide applicability. 123 S.Ct. at 1980. In *Hibbs,* the Supreme Court recognized that the "important shortcomings of *some* state policies" provided sufficient evidence of constitutional violations by the states. *Id.* (emphasis added). As Justice Scalia's dissent so vigorously pointed out, however, Congress failed to document evidence of unconstitutional discrimination in *all* fifty states. *Id.* at 1985 (Scalia, J., dissenting). Thus, we decline to hold that Congress had to find evidence of unconstitutional voting discrimination by each of the fifty states in order to apply section 2 nationwide.

Finally, even if nationwide evidence were a prerequisite to national utilization of section 2, Congress had before it sufficient evidence of discrimination in jurisdictions not covered by section 5 to warrant nationwide application. As the Senate Report noted, "[t]he hearing record before this committee and the House committee includes testimony as to the existence of discriminatory practices outside of the covered jurisdictions, including cases already adjudicated against various non-covered jurisdictions." 1982 Senate Report at 42 n. 161, U.S.Code Cong. & Admin.News at 220 n. 161. Indeed, the Eleventh Circuit concluded that "Congress did find evidence of substantial discrimination outside [covered] jurisdictions." *Marengo County Comm'n,* 731 F.2d at 1559.[9]

In sum, after "Congress [had] explored with great care the problem of racial discrimination in voting," *Garrett,* 531 U.S. at 373, 121 S.Ct. 955, and established an "undisputed record of racial discrimination," *Fla. Prepaid,* 527 U.S. at 640, 119 S.Ct. 2199, it was justified in applying section 2 nationwide. As Justice O'Connor has said, Congress amended section 2 in 1982 to address the "sad reality that there still are some communities in our Nation where racial politics do dominate the electoral process." *Vera,* 517 U.S. at 992, 116 S.Ct. 1941 (O'Connor, J., concurring).

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[9] Blaine County quibbles about the sufficiency of the evidence in the congressional record supporting discrimination in non-covered jurisdictions. It argues, for example, that most of the reported cases cited by the United States ended in consent decrees, and that such settlements are not a reliable indicator of purposeful voting discrimination because of the financial incentives to settle. Although we cannot ascertain the motives of jurisdictions that settled these voting rights cases, a consent decree requires court approval, making it unlikely that spurious claims of purposeful voting discrimination would be settled through an enforceable consent decree.

Thus, we conclude that Congress did not exceed its Fourteenth and Fifteenth Amendment enforcement powers by applying section 2 nationwide.

2. The Results Test

Next we consider whether Congress exceeded its authority when it adopted section 2's results test, thereby repudiating any intent requirement. In *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), the Supreme Court held that the Fourteenth and Fifteenth Amendments only prohibit purposeful discrimination. Therefore, the County argues, section 2's results test lacks congruence and proportionality because it does not require intentional discrimination and thereby prohibits electoral procedures that are constitutional under *Bolden.*

The most obvious problem with the County's argument is that on the exact same day that the Court issued its opinion in *Bolden,* the Court also held in *City of Rome v. United States* that section 5 of the VRA could constitutionally be applied to electoral procedures that only had discriminatory results and were not motivated by discriminatory intent. 446 U.S. 156, 173-178, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) ("We hold that, even if § 1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment], outlaw voting practices that are discriminatory in effect."). As the Court explained, Congress justifiably adopted an effects test because requiring proof of intent would cause "the perpetuation of earlier, purposeful racial discrimination, regardless of whether the practices they

prohibited were discriminatory only in effect." *Id.* at 177, 100 S.Ct. 1548.

Thus, under *City of Rome,* Congress can prohibit voting requirements that have discriminatory results. If section 5's results test is constitutional, the same must be true of section 2's results test. In fact, the constitutionality of section 2's results test is more certain because section 2 is far narrower than section 5's preclearance requirements.

Additionally, Congress thoroughly considered the practical and constitutional implications of the results test, and reasonably concluded that an intent test would not effectively prevent purposeful voting discrimination. As the Fifth Circuit viewed the congressional evidence, "[e]mpirical findings by Congress of persistent abuses of the electoral process, and the apparent failure of the intent test to rectify those abuses, were meticulously documented and borne out by ample testimony." *Jones v. City of Lubbock,* 727 F.2d 364, 375 (5th Cir.1984) (quoting *Major v. Treen,* 574 F.Supp. 325, 342-49 (E.D.La.1983) (3-judge district court)). After listening to over 100 witnesses and at least 27 days of testimony in the Senate alone, Congress concluded that an intent requirement would undermine efforts to eliminate invidious discrimination. Even when courts applied a results test prior to *Bolden,* section 2 litigation was extremely difficult,[10] and very few cases were pursued each year. *Bolden,* however, "brought efforts to overcome discriminatory barriers to minority

[10] *VRA Hearings, supra* note 8, at 796-97 (statement of Armand Derfner, The Joint Center for Political Studies).

political participation almost to a complete halt."[11] Of the three voting rights lawyers that testified before Congress, not one had filed a voting rights lawsuit since the Court had issued its decision in *Bolden*.[12] The record before the Senate reflected that, after *Bolden*, district courts had vacated judgments of vote dilution and, on retrial under the intent test, discriminatory voting mechanisms withstood judicial scrutiny.[13] The intent test was hopelessly ineffective because those who enacted ancient voting requirements could not be subpoenaed from their graves, and present-day legislators were protected from testifying about their motives by legislative immunity.[14] Moreover, cities and counties did not maintain legislative histories, especially from fifty or a hundred years ago.[15] There was also testimony that the intent test was ineffective because purposeful discrimination could be hidden underneath false trails planted in the legislative record.[16] The intent test had the added burden of placing local judges in the difficult position of labeling their fellow public servants "racists." And the intent test's divisiveness threatened to

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[11] *VRA Hearings*, *supra* note 8, at 462 (prepared statement of Hon. Henry L. March, Mayor of the City of Richmond, Va.); *see also id.* at 640 (statement of David Walbert, Former Law Professor, Emory University) ("I have not filed a dilution case since *Mobile*.").

[12] *VRA Hearings*, *supra* note 8, at 813 (prepared statement of Armand Derfner).

[13] 1982 Senate Report, *supra*, at 37-39.

[14] 1982 Senate Report, *supra*, at 36-37.

[15] *VRA Hearings*, *supra* note 8, at 709 (Letter from the Lawyers' Committee for Civil Rights Under Law re: Questions and Answers on the Section 2 "Results" Standard of S.1992).

[16] 1982 Senate Report, *supra*, at 37.

undermine racial progress, thereby worsening purposeful discrimination.[17]

But these difficulties were not the principal justification for rejecting the intent test. As the Senate Report explained:

> The main reason is that, simply put, the test asks the wrong question. In the *Bolden* case on remand, the district court after a tremendous expenditure of resources by the parties and the court, concluded that officials had acted more than 100 years ago for discriminatory motives. However, if an electoral system operates today to exclude blacks or Hispanics from a fair chance to participate, then the matter of what motives were in an official's mind 100 years ago is of the most limited relevance.

1982 Senate Report, *supra,* at 43, U.S.Code Cong. & Admin.News at 221.

After careful consideration, Congress found that the results test would be a carefully crafted measure to remedy purposeful discrimination. Congress examined twenty-three reported cases in which the results test was applied. It found that the test did not prohibit any particular voting procedure *per se,* that it did not assume racial bloc voting, that it was not aimed at achieving proportional representation, that a limited number of cases were filed, and that plaintiffs did not always win. Congress also determined that section 2 is "self-limiting" because of the

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[17] Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L.Rev. 725, 735 (1998).

numerous hurdles that plaintiffs must cross to establish a vote dilution claim.[18] In fact, calling section 2's test a "results test" is somewhat of a misnomer because the test does not look for mere disproportionality in electoral results. Rather, plaintiffs must establish that under the totality of the circumstances, the challenged procedure prevents minorities from effectively participating in the political process. In sum, we agree with the Eleventh Circuit's view that "Congress conducted extensive hearings and debate on all facets of the Voting Rights Act and concluded that the 'results' test was necessary to secure the right to vote and to eliminate the effects of past purposeful discrimination." *Marengo County Comm'n,* 731 F.2d at 1557. Thus, we hold that the results test is a constitutional exercise of Congress' Fourteenth and Fifteenth Amendment enforcement powers.[19]

IV.

Next, Blaine County challenges the district court's conclusion that its at-large voting system violated section

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[18] 1982 Senate Report, *supra,* at 32-33.

[19] The County argues that section 2 requires proportional representation, apparently ignoring the statute's plain language: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b). The County also contends that section 2 must contain a sunset provision and an opt-out provision like section 5 of the VRA. Although the Supreme Court has viewed such provisions favorably because of section 5's extraordinary remedy, it has expressly rejected the notion that the Fourteenth Amendment "requires termination dates, geographic restrictions, or egregious predicates." *City of Boerne,* 521 U.S. at 533, 117 S.Ct. 2157. Section 2 therefore need not contain such limitations because it is a narrower provision than section 5 of the VRA.

2. We review for clear error the district court's factual findings related to the vote dilution claim, as well as its ultimate determination that vote dilution exists. *Old Person v. Cooney,* 230 F.3d 1113, 1119 (9th Cir.2000). However, questions of law and mixed questions of law and fact are subject to *de novo* review. *Smith v. Salt River Project,* 109 F.3d 586 (9th Cir.1997). Because the district court did not commit legal error, and its factual findings and ultimate conclusion that vote dilution exists are not clearly erroneous, we affirm.

A.

The County disputes the district court's finding that American Indians were politically cohesive. To be clear, the County does not challenge the district court's finding that American Indians vote cohesively. Indeed, the evidence indisputably shows that American Indians consistently bloc vote. Dr. Theodore Arrington, the United States's expert witness, testified that in all fourteen county-wide elections he examined, American Indian voters exceeded 67 percent cohesion – his threshold for cohesive minority voting. He also found American Indian voter cohesion in 100 percent of 19 elections for the Board of Harlem School District, an area of high American Indian concentration within Blaine County. Even the County's expert witness conceded that American Indians voted cohesively in 100 percent of County Commissioner elections and 95 percent of exogenous elections for county, state, and national offices.[20]

[20] The County's expert witness assumed a racial group was cohesive if its members voted at 60 percent cohesion.

The County argues that the district court nonetheless erred because there was no evidence that American Indian voters have distinct political concerns. The County, however, misconstrues the inquiry for racial bloc voting. As the Supreme Court explained in *Gingles,* "a showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim." 478 U.S. at 31, 106 S.Ct. 2752. Indeed, we have recognized that "proof that the minority has consistently voted differently helps one to ascertain whether the minority group members constitute a politically cohesive unit." *Gomez v. City of Watsonville,* 863 F.2d 1407, 1415 (9th Cir.1988). Thus, the Supreme Court and this court both have held that it is actual voting patterns, not subjective interpretations of a minority group's political interests, that informs the political cohesiveness analysis.

Even if this were a matter of first impression, we would reject Blaine County's proposed standard because it would force courts to second guess voters' understanding of their own best interests. Indeed, the County's argument is not simply that American Indians lack shared interests, but that their shared interests are unfounded. The County, therefore, essentially asks us to deny the validity of American Indian voters' self-professed interests. Were we to do so, we would be answering what is inherently a political question, best left to the voters and their elected representatives. Thus, the district court applied the appropriate legal test for determining whether the American Indian population is politically cohesive, and its findings were well-supported by the record.

B.

Blaine County also challenges the district court's refusal to consider low turnout among American Indian voters as evidence of a lack of political cohesion. We essentially rejected this argument in *Gomez v. City of Watsonville,* 863 F.2d 1407 (9th Cir.1988), holding that "[t]he district court erred by focusing on low minority voter registration and turnout as evidence that the minority community was not politically cohesive." *Id.* at 1416. Despite this unequivocal language, Blaine County suggests *Gomez* left open the possibility that low turnout could prove a lack of cohesiveness if there was evidence to support such a conclusion. At the very least, this is a strained reading of *Gomez* that simply cannot be squared with the plain language of our decision: "The court should have looked only to *actual voting patterns* rather than speculating as to the reasons why many Hispanics were apathetic." *Id.*

Apart from our precedent, Blaine County's suggested approach would undermine section 2's effectiveness. After all, "[l]ow voter registration and turnout have often been considered evidence of minority voters' lack of ability to participate effectively in the political process." *Id.* at 1416 n. 4. Thus, if low voter turnout could defeat a section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on. Thus, the district court did not err by rejecting low voter turnout as evidence of a lack of political cohesion.

C.

Blaine County also contends that the district court erred in its analysis of white bloc voting because the court did not require white voter cohesion levels to surpass 60 percent. This contention flatly ignores the test laid out in *Gingles* for white bloc voting – "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U.S. at 49, 106 S.Ct. 2752. Indeed, *Gingles* rejected a blanket numerical threshold for white bloc voting because:

> The amount of white bloc voting that can generally minimize or cancel black voters' ability to elect representatives of their choice . . . will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices . . . ; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field.

Id. at 56, 106 S.Ct. 2752 (citations omitted).

Applying the appropriate standard, the district court's factual findings were not clearly erroneous. Dr. Arrington specifically studied whether white voters were usually able to defeat the American Indian-preferred candidate. In five out of seven county-wide elections between an American Indian candidate and white candidate, the American Indian candidate lost despite receiving strong American Indian support. In four out of five contested Democratic primaries for the County Commission, white voters were

able to defeat the American-Indian-preferred candidate. Similar bloc voting patterns were observed in Harlem School Board elections. Accordingly, the district court did not err in finding white bloc voting.

D.

The County also argues that the district court committed legal error by placing greater weight on elections which involved American Indian candidates. In *Old Person,* however, we held that "contests between white and Indian candidates . . . are most probative of white bloc voting." 230 F.3d at 1127; *see also Ruiz,* 160 F.3d at 553 ("*minority v. non minority election* is more probative of racially polarized voting than a *non-minority v. non-minority election*"). Accordingly, we reject the County's argument because it is contrary to our settled precedent.

E.

Next, Blaine County argues that the district court inappropriately relied on Harlem School Board elections to find cohesive voting patterns. But the district court did not rely exclusively, or even mostly, on the Harlem School Board elections. Rather, these elections provided additional evidence of American Indian voter cohesion and white bloc voting. As Dr. Arrington testified, the Harlem School Board elections provide useful evidence of cohesive voting patterns because American Indians make up a substantial percentage of the population of the school district and American Indians have frequently run for positions on the board. The district court did not commit legal error by examining exogenous elections to supplement its analysis of racially cohesive voting patterns in

the at-large county commission elections. *See Citizens for a Better Gretna v. City of Gretna,* 834 F.2d 496, 502 (5th Cir.1987) ("Although exogenous elections alone could not prove racially polarized voting in Gretna aldermanic elections, the district court properly considered them as additional evidence of bloc voting – particularly in light of the sparsity of available data.").

F.

The County also contends that the district court erred by failing to require proof that white bloc voting was the result of racial bias in the electorate. But as we have explained, "proof of groupwide or individual discriminatory motives has no part in a vote dilution claim." *Ruiz,* 160 F.3d at 557. Requiring proof of discriminatory motives among white voters in Blaine County would be divisive and would place an impossible burden on the plaintiffs. *Id.* at 558. Most important, the County's assumption that intentional discrimination among white voters must be shown is contrary to the plain language of section 2's results test. *See Gingles,* 478 U.S. at 43-44, 106 S.Ct. 2752 (holding that section 2 "repudiated" the intent test). Thus, we reject the notion that the district court was required to unearth evidence of discrimination in the white electorate to find a section 2 violation.[21]

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[21] We reject the County's contention that *Smith v. Salt River,* 109 F.3d 586 (1997), compels a contrary conclusion. Although *Salt River* did hold that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry," we never suggested that discrimination in the electorate must be proven. *Id.* at 595. *Salt River* simply held that there must be a causal connection between a voting requirement and a discriminatory result. *Id.* There is

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G.

The County next makes a series of challenges to the district court's determination that there was a history of official discrimination against American Indians. First, it claims the district court here improperly relied on another district court's Findings of Facts and Conclusions of Law in *Old Person v. Cooney,* 230 F.3d at 1129. We disagree. Although the district court pointed to the factual findings in *Old Person* for a detailed description of the history of racial discrimination against American Indians in Montana, it relied on the "extensive testimony" presented here by the United States.

In light of the breadth of this testimony, the district court's factual findings on this issue did not constitute clear error. As the United States's expert witness testified, Montana laws repeatedly discriminated against American Indians' exercise of the franchise.[22] In 1897, for example, the Montana legislature passed a law prohibiting American Indians from voting unless they were government

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such a connection here: Blaine County's at-large voting system enhances the possibility that a bloc of white voters will prevent American Indians from electing candidates of their choice. In challenges to multimember districts, evidence of racial bloc voting provides the requisite causal link between the voting procedure and the discriminatory result. Once such a connection is shown, nothing in *Salt River* suggests that plaintiffs have the additional burden of proving that white bloc voting is due to discriminatory motives. Accordingly, the district court did not err by declining to inquire into the divisive and irrelevant issue of whether white voters in Blaine County are motivated by discriminatory motives.

[22] Because these discriminatory laws were enacted by the Montana legislature, we find no merit in the County's assertion that the district court improperly relied on evidence of official discrimination by the federal government.

employees or owned a home outside of a reservation.[23] Two years later, the Montana legislature requested that the federal government prohibit American Indians from leaving their reservations.[24] In 1912, the State Attorney General declared that any American Indian who participated in tribal affairs could not participate in general or school board elections. The Montana legislature also passed legislation in 1919 prohibiting the creation of an electoral district within the boundaries of a reservation. Finally, beginning in 1932 and continuing through 1963, the Montana legislature enacted various laws limiting voting to taxpayers, which served to disenfranchise many reservation residents who were exempt from property taxes. In short, we find that the district court's conclusion that there was a history of official discrimination against American Indians in Montana was not clearly erroneous.

H.

Blaine County also challenges the district court's totality-of-the-circumstances analysis on several fronts. First, the County argues that the district court could only look at official discrimination by Blaine County, not the state or federal government. We rejected this exact argument

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[23] The fact that these laws targeted American Indians undermines the County's contention that the statutes considered by the district court were irrelevant because they were not aimed at American Indian voters.

[24] The County argues that segregation within its borders is merely the result of benign federal policies and choices by American Indians. The Montana legislature's support for a federal law prohibiting American Indians from traveling outside of reservations, as documented in the record, amply supports the district court's contrary conclusion.

in *Gomez,* 863 F.2d at 1418, because this overly narrow interpretation of the first Senate factor "would result in precisely the sort of mechanistic application of the Senate factors that the Senate report emphatically rejects." *Id.*

Next, the County argues in a single sentence that there is no evidence of racially polarized voting. Both sides' experts agreed that American Indians almost always vote cohesively, and Dr. Arrington, the government's expert, testified that white voters frequently vote as a bloc, which precludes American Indians from electing candidates of their choice. Even if reasonable minds could disagree, the County does not explain why the district court's finding was clearly erroneous.

The County contends that there is no evidence that it uses other procedures to discriminate against minority voters. However, the evidence showed that staggered terms prevent American Indians from bullet voting,[25] and

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[25] When all candidates for a legislative body are elected at-large at the same time, a minority group still has the opportunity to elect a minority-preferred candidate through bullet voting, also known as one-shot voting. Minority voters can concentrate their vote on electing one minority-preferred candidate, while the majority vote will be split among the majority candidates. As the U.S. Commission on Civil Rights explained:

> Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates

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the County's enormous size makes it extremely difficult for American Indian candidates to campaign county-wide in at-large elections. Thus, the district court did not commit clear error in finding that Blaine County's electoral procedures enhanced the opportunity for discrimination against American Indians.

The County also argues that there are no socioeconomic differences between American Indians and whites in Blaine County. However, the government's evidence showed that Blaine County's American Indian families are three times more likely than its white families to live below the poverty line. Similar disparities were found in graduation, unemployment, and vehicle-ownership rates. Along the same lines, the County contends that there is no causal link between discrimination and whatever socioeconomic disparities might exist. There was, however, extensive evidence of official discrimination by federal, state, and local governments against Montana's American Indian population.

The County next contends that American Indians are unwilling to run for office. The district court found, however, that American Indians frequently run for the Harlem School Board, which demonstrates that there is a pool of qualified American Indian candidates. American Indians also testified that they were currently unwilling to run for County Commissioner because white bloc voting made it

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and if the vote of the majority is divided among a number of candidates.

U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 206-207 (1975). Because Blaine County's at-large elections are staggered, American Indians are prevented from utilizing bullet voting to elect a candidate of their choice to the Blaine County Commission.

impossible for an American Indian to succeed in an at-large election. The County again fails to explain how the district court's finding on this point was clearly erroneous.

The County contends that at-large elections make the county commissioners responsive to voters throughout Blaine County. However, the district court found that Montana does not require at-large elections and that the county government depends largely on residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions. The County does not dispute these findings, and therefore we conclude that the district court did not clearly err in determining that the asserted justifications for having at-large elections were tenuous.

Finally, the County argues that there are no structural barriers that prevent American Indians from voting. Although voter registration barriers would certainly provide evidence that minority voters were prevented from participating in the political process, the absence of such barriers hardly proves that the County's at-large voting system is permissible under section 2.

In short, the district court did not err in its totality of the circumstances analysis.[26]

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[26] Even if the County persuaded us that the district court had erred with respect to one factor, *Gingles* makes clear that not every Senate factor, or even a majority of Senate factors, must weigh in favor of a vote dilution finding. 478 U.S. at 45, 106 S.Ct. 2752. The County has not convincingly argued that the district court erred in its analysis of a single factor, much less that such an error undermined the district court's ultimate finding of vote dilution to such an extent that the overall vote dilution determination was clearly erroneous. *See id.* at 79, 106 S.Ct. 2752.

V.

The County argues that the district court failed to rule on its objections to the expert testimony of Drs. Arrington, Hoxie, and McCool. Our decision in *Mukhtar v. Cal. State Univ., Hayward,* 299 F.3d 1053 (9th Cir.2002), "require[s] a district court to make *some* kind of reliability determination to fulfill its gatekeeping function" under Federal Rules of Evidence 702. *Id.* at 1066 (emphasis in original). Here, the district court made the necessary reliability determination with respect to Dr. Arrington's testimony and report. After all, the district court explicitly found that race-identified registration lists, utilized by Dr. Arrington, "are consistently accepted methods of data collection for § 2 voting rights cases."[27]

We agree that the district court failed to determine the reliability of portions of Dr. Hoxie's testimony and the entirety of Dr. McCool's expert testimony, despite objections

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[27] We also hold that the district court's decision to admit Dr. Arrington's testimony did not constitute an abuse of discretion. *See Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). The County challenges Dr. Arrington's use of race-identified registration lists. However, both Dr. Arrington and Dr. Weber, the County's expert, testified that race-identified registration lists are commonly used and acceptable tools for examining racial voting patterns. Indeed, race-identified registration lists are arguably superior to the alternatives, such as the use of census data, because they make no assumptions about registration rates in particular communities. Moreover, the notion that Dr. Arrington's analysis was methodologically flawed is belied by the fact that Dr. Arrington's and Dr. Weber's bivariate ecological regression analysis and homogenous precinct analysis yielded similar results. Finally, Dr. Arrington actually went beyond procedures used in previous section 2 cases and divided his coders into separate groups. Thus, there was no abuse of discretion in admitting Dr. Arrington's testimony and exhibits.

by Blaine County.[28] The district court's decision is not reversible, however, if its failure to make the required reliability determination was harmless. *Mukhtar,* 299 F.3d at 1065.

We conclude that the district court's error was harmless because the tainted testimony was not essential to the district court's ultimate finding of vote dilution. The district court's memorandum decision never specifically cites the testimony of Dr. Hoxie or Dr. McCool. At most, the district court relied on this testimony to find a history of official discrimination, the first Senate factor. But Dr. Hoxie's testimony regarding events between 1844 and 1959, which the County does not challenge, provides independent evidence of official discrimination by the State of Montana.

In any event, the first Senate factor is not critical. As *Gingles* explained, "the most important Senate Report factors bearing on § 2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'" 478 U.S. at 51 n. 15, 106 S.Ct. 2752. In fact, *Gingles* expressly stated that other factors, such as the first Senate factor, "are supportive of, but *not essential to,* a minority voter's claim." *Id.* Therefore, even if we exclude the tainted testimony, and

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[28] Because we agree that the district court failed to expressly determine the reliability of Dr. Hoxie and Dr. McCool's testimony, we do not address the County's alternative argument that their testimony should not have been admitted because it was methodologically flawed. However, we note that the County does not challenge Dr. Hoxie's methodology with respect to his examination of the period 1844-1959.

even if we assume that testimony was critical to the district court's analysis of the first Senate factor, we would not disturb the district court's ultimate finding of vote dilution. Accordingly, any *Mukhtar* error here was harmless.

VI.

In sum, we affirm the district court's summary judgment upholding section 2's constitutionality and its declaration that Blaine County's at-large voting system violated section 2.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

* * *

THE UNITED STATES OF AMERICA, Plaintiff, v. BLAINE COUNTY, MONTANA; DON K. SWENSON, ARTHUR KLEINJAN and VICTOR J. MILLER, in their official capacities as members of the Blaine County Board of Commissioners; and SANDRA BOARDMAN, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County, Montana, Defendants.	CV-S-99-122-GF-PMP FINDINGS OF FACT AND CONCLUSIONS OF LAW and ORDER (Filed Mar. 21, 2002)

Plaintiff United States of America commenced this action on November 16, 1999, pursuant to Sections 2 and 12(d) of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973j(d), and 28 U.S.C. § 2201. This Court has jurisdiction pursuant to 42 U.S.C. § 1973j(f) and 28 U.S.C. § 1345.

Defendant Blaine County, Montana, is a political and geographical subdivision of the State of Montana. Defendants Don K. Swenson, Arthur Kleinjan and Victor J.

Miller are elected members of the Blaine County Board of Commissioners and are sued in their official capacities in connection with their exercise of the legislative and executive powers of Blaine County. Defendant Sandra Boardman is the Clerk and Recorder of Blaine County and is sued in her official capacity as the Superintendent of Elections for Blaine County.

On May 17, 2001, the undersigned was designated from the District of Nevada to perform the duties of the United States District Judge for the District of Montana for all proceedings including entry of Judgment in this specific case. A bench trial was conducted at Great Falls, Montana, between October 9-18, 2001, and post-trial briefing was completed on January 10, 2002. Based upon the evidence adduced at trial, the Court makes the following Findings of Fact and Conclusions of Law.

FACTUAL BACKGROUND

Blaine County is located in north central Montana. According to the 2000 decennial census, the total population of Blaine County is 7,009 consisting of 3,685 (52.6%) white people, and 3,167 (45.2%) American Indians and Alaskan natives.[1] The total voting age population ("VAP") of Blaine County is 4,722 of whom 2,805 (59.4%) are white and 1,834 (38.8%) are American Indians and Alaskan natives. Most of Blaine County's American Indian population is concentrated on the Fort Belknap Reservation, 80% of which is situated within Blaine County. The Fort

[1] The population data for Indians living in Blaine County includes all persons who identified themselves as American Indians in the 2000 census, whether or not they are members of federally recognized tribes.

Belknap Reservation was created in May 1888, as a permanent home for the Gros Ventre and Assiniboine Indian tribes. *Winters v. United States*, 207 U.S. 564, 565 (1908). Approximately 83% of the American Indians who live in Blaine County reside within the boundaries of the Fort Belknap Reservation.

The Blaine County Board of Commissioners consist of three members, each of whom must reside in one of three different residential districts in the County. The Commissioners are elected at large by a majority vote of the entire County for six-year staggered terms, such that every even-numbered year in November, one of the three Commissioners must stand for election. At-large primary elections are conducted in June, with the plurality winner advancing to the November general election.

In their Complaint, Plaintiff United States alleges that the at-large method of election for the members of the Blaine County Board of Commissioners violates the discriminatory result standard of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a), as amended, (hereinafter "Act").[2] Specifically, Plaintiff United States asserts that the at-large method of election for members of the Blaine County Board of Commissioners results in American Indian citizens having less opportunity than white citizens to participate in the political process and to elect representatives of their choice in violation of Section 2 of the Act. Plaintiff seeks declaratory relief that would declare the existing at-large method of election of the

[2] The Court previously rejected Defendants' challenge to the constitutionality of Section 2's discriminatory result standard and upheld the Act on its face and as applied to American Indians. *United States v. Blaine County, Montana*, 157 F.Supp.2d 1145 (D. Montana 2001).

Board of Commissioners violative of Section 2 of the Act. Plaintiff also seeks injunctive relief which would enjoin Defendants from continuing to use the at-large system in future elections, and would require Defendants to devise and present to the Court a district voting plan that remedies the Section 2 violation.

DISCUSSION

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Therefore, to prevail on the § 2 claim, Plaintiff must prove "'that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [American Indians, a "language minority group" protected by the Act under 42 U.S.C. § 1973aa-1a(e)] in that [their] members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Old Person v. Cooney*, 230 F.3d 1113, 1120 (9th Cir. 2000) (quoting 42 U.S.C. § 1973(b)).

The essence of a § 2 claim is that an "electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). While the results standard does not provide an assurance of success at the polls for minority preferred candidates, it does provide an assurance of a fair process. *Johnson v. De Grandy*, 512 U.S. 997, 1014 (1994).

In *Gingles*, the Supreme Court set out the framework under which a §2 violation should be evaluated. First, the Court determined that §2 is violated when an election mechanism results in discrimination regardless of whether an intent to discriminate existed. The *Gingles* Court went on to state that the "right" question to consider for §2 violations was "whether 'as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice.'" *Gingles*, 478 U.S. at 43-44 (quoting S. Rep. No. 97-417 at 28 (1982)).

The Court specified three preliminary factors to be met in order to find a §2 violation:

(1) The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district;

(2) The minority group must be able to show that it is politically cohesive; and

(3) The minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, such as the minority candidate running unopposed, usually to defeat the minority's preferred candidate.

Gingles at 50-51 (internal citations omitted). It is only after all three *Gingles* factors are met that a "court must decide the ultimate question of vote dilution." *Old Person*, 230 F.3d at 1120 (citing 42 U.S.C. § 1973(b)). In making this determination, the Court must consider whether, under the totality of circumstances, American Indians have been denied an equal opportunity to participate in the political process and to elect representatives of their choice in Blaine County. *Id.*

Drawing from the Senate Judiciary Committee Majority Report that accompanied the bill amending the Voting Rights Act in 1982, the *Gingles* Court cited a non-exhaustive list of factors that are important in any § 2 vote dilution inquiry:

> "1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

"[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

"[9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

Gingles, 478 U.S. at 36-37 (quoting S. Rep. No. 97-417 at 28-29 (1982) *reprinted in* U.S.C.C.A.N. 177, 206-07).

In considering the "totality of the circumstances" factors, no requirement exists that "'any particular number of facts be proved, or that a majority of them point one way or the other.'" *Gingles*, 478 U.S. at 45 (quoting S. Rep. at 29). Rather, § 2 "requires the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson* and *Burns*, 'minimized or cancelled.'" S. Rep. at 29 n. 118 (referencing *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)); and *Burns v. Richardson*, 384 U.S. 73, 88 (1996).

A. THE *GINGLES* FACTORS

1. *Gingles One:* Compactness.

The first *Gingles* prong requires a showing that the number of American Indians in Blaine County "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. The parties agree, and the evidentiary record demonstrates, that the American Indian VAP in Blaine County is of sufficient size and concentration to be a majority of the voters using traditional districting principals [sic] to draw at least one single-member district within Blaine County. Indeed, approximately 38.6% of Blaine County's voting age population is comprised of American Indians, most of whom reside on or near the Fort Belknap Reservation.

2. *Gingles Two:* Political Cohesiveness.

The second *Gingles* prong requires that Plaintiff prove that American Indians in Blaine County are politically cohesive. The third *Gingles* prong requires that Plaintiff prove that despite the political cohesion of American Indians in Blaine County, the white majority in Blaine County usually votes as a bloc "to defeat the minorities preferred candidate." *Gingles*, 478 U.S. at 50-51. Taken together, the second and third prongs measure the extent to which voting in Blaine County is racially polarized. No mathematical formula exists for determining the existence of polarized or bloc voting for purposes of § 2. Instead, the *Gingles* Court stated that legally significant racially polarization exists "where there is a consistent relationship between [the] race of the voter and the way in which the voter votes . . . or to put it differently, where [minority] voters and white voters vote differently." *Gingles*, 478 U.S. at 53 n.21 (internal citations omitted).

Plaintiff's expert, Dr. Theodore Arrington, defined politically cohesive voting as occurring when 67% or more of a minority group votes for the same candidate, or votes for candidates of their minority group over white candidates. Applying a two-third majority measure for political cohesion, Dr. Arrington's examination of five county commissioner primary elections, four general county commissioner elections, three elections for state representative, one congressional primary and one congressional general election, demonstrated that 67% of American Indians who voted, voted for the same candidate.[3] Indeed,

[3] During trial, the Court reserved ruling as to the admissibility of Plaintiff's Exhibits 1-21. Defendants objected to the Exhibits on the grounds that Dr. Arrington's use of race-identified registration lists

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for these fourteen elections, Dr. Arrington concluded that an average of 89% of American Indians voted for the same candidate. Dr. Arrington also found the same cohesive voting pattern for American Indians in his examination of nineteen Harlem School Board elections.

The findings of Defendants' expert, Dr. Ronald Webber [sic], are not inconsistent with those of Dr. Arrington. Employing a 60% standard for measuring cohesion among American Indian voters, Dr. Webber [sic] found that American Indians voted cohesively in 100% of the county commissioner elections he examined, and in approximately 95% of the exogenous elections he examined.

Plaintiff argues that *Old Person* requires a showing that American Indians were political [sic] cohesive in more than 70% of the examined elections in order to meet the second *Gingles* prong. However, Plaintiff's reliance on *Old Person* for this proposition is misplaced because the parties in *Old Person* stipulated to political cohesion at the time of trial. *Old Person*, 230 F.3d at 1121. Nevertheless, the percentages of cohesion evidenced through the testimony of Drs. Arrington and Webber [sic] , persuades this Court that a "significant number" of American Indian voters in

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found through "coders" who determined the race of voters, was not a permissible methodology under Rule 702 of the Federal Rules of Evidence. The Court disagrees. Race-identified registration lists were used by experts in the same area in *Old Person v. Cooney*, 230 F.3d at 1121. Indeed, Dr. Arrington relied on the *Old Person* registration lists for his analysis of the 1990, 1992, 1994 and 1996 elections in Blaine County. Additionally, both Drs. Arrington and Weber testified that race-identified registration lists are consistently accepted methods of data collection for § 2 voting rights cases. The Court, therefore, overrules Defendant's objection and admits Exhibits 1 through 21.

Blaine County usually vote for the same *candidates. Gingles*, 478 U.S. at 56.

Defendants' contention that low voter turnout by American Indians in Blaine County's primary elections defeats Plaintiff's claim that American Indians are politically cohesive is not persuasive. Indeed, an argument similar to that advanced by Defendants was rejected by the Ninth Circuit Court of Appeals in *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1080 (1989). *Gomez* requires that this Court look to actual voting patterns rather than speculating as to why there is a low turnout of American Indian voters in Blaine County's primary elections. Moreover, the evidence adduced at trial is simply inadequate to enable this Court to make conclusive factual findings as to reasons for low voter turnout by American Indian citizens of Blaine County.

The Court also rejects Defendants' argument that American Indians in Blaine County are not politically cohesive because they lack group interests that are distinct from the white citizens of Blaine County. The evidence presented at trial shows the contrary. Similarly, Defendants' argument that American Indians lack distinctive political interests because the Blaine County Commission plays only a limited role in their lives is not supported by the evidence adduced at trial. The evidentiary record demonstrates that some issues considered by the Blaine County Commission may have limited direct affect on the Fort Belknap Reservation and that certain distinctive political interests on the part of American Indians in Blaine County stem from socio-economic disparities and geographic and racial separation. However, it is not necessary for the Court to consider such factors where, as

here, compelling evidence regarding the voting behavior of the American Indian community in Blaine County so forcefully demonstrates political cohesion. *Gomez*, 863 F.2d at 1416.

3. *Gingles Three:* White Bloc Voting

Under the third *Gingles'* prong, "the court must determine whether the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances . . . usually to defeat the minority's preferred candidate" *Old Person*, 230 F.3d at 1121-22 *(quoting Gingles*, 478 U.S. at 51). The *Gingles* Court recognized the amount of white bloc voting which would cause the cancellation of the minority voter's ability to elect a candidate would vary depending upon the voting district at issue based on certain factors, including:

- the nature of the allegedly dilutive electoral mechanism;
- the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting;
- the percentage of registered voters in the district who are members of the minority group;
- the size of the district;
- and, in multimember districts, the number of seats open and the number of candidates in the field.

Gingles, 478 U.S. at 56. Thus, the third prong "asks a predominately historical question – that is, whether the

Section 2 majority bloc usually defeats the minority's preferred candidate." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 555 (9th Cir. 1998).

The Ninth Circuit Court of Appeals has applied a two-step process for ascertaining white bloc voting. "The process requires the court (1) to determine the candidate preferred by Indian voters; and (2) to determine whether whites voted as a bloc to defeat the Indian-preferred candidate." *Old Person*, 230 F.3d at 1122. *See also Ruiz*, 160 F.3d at 550; and *Valladolid v. City of Nat. City*, 976 F.2d 1293, 1296-97 (9th Cir. 1992). To determine who is the minority-preferred candidate in a particular election, a court must ask "which candidate receives the most votes from minority voters." *Id.* at 552 (citing *Lewis v. Alamance County*, 99 F.3d 600, 614 (4th Cir. 1996); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1018-19 (2d Cir. 1995); and *Clarke v. City of Cincinnati*, 40 F.3d 807, 810 n.1 (6th Cir. 1994)). However, a specific percentage is not required. *Ruiz*, 160 F.3d at 552 ("Therefore, we hold that a candidate who receives sufficient votes to be elected if the election were held only among the minority group in question qualifies as minority-preferred."). Additionally, a general election candidate does not need to be treated as the minority preferred candidate "when another candidate receiving greater support in the primary failed to reach the general election." *Id.* (quoting *Niagara Falls*, 65 F.3d at 1019). Finally, the minority preferred candidate may be a non-minority. *Ruiz*, 160 F.3d at 551.

Defendants argue that bloc voting and cohesion are the same and thus, the same standard should apply for both. Defendants point to a *Gingles* Court statement that "a showing that a significant number of minority group

members usually vote for the same candidate is one way of proving the ***political cohesiveness*** necessary to a vote dilution claim . . . and, consequently, establishes ***minority bloc voting*** within the context of § 2." *Gingles*, 478 U.S. at 52 n.18 (emphasis added). Further, Defendants cite to the *De Grandy* Court's use of cohesion and bloc voting interchangeably in a sentence. 512 U.S. at 1011 ("The [Gingles] Court thus summarized the three now-familiar *Gingles* factors (compactness/numerousness, ***minority cohesion or bloc voting***, and ***majority bloc voting***) as 'necessary preconditions' . . . for establishing vote dilution.") (emphasis added). Finally, Defendants offer *Teague v. Attala County* where the Fifth Circuit used the two phrases interchangeably:

> The existence of ***racial bloc voting*** pertains to a vote dilution claim in two ways. ***Bloc voting by blacks*** tends to prove that the black community is ***politically cohesive.*** In other words, it shows that blacks as a group tend to support the same candidate as they would elect if voting in a single member, black majority district. Naturally, however, ***politically cohesive voting behavior*** will not elect the minority's candidate of choice if the ***majority group*** is similarly ***politically cohesive. Bloc voting*** by a ***white majority*** tends to prove that blacks will generally be unable to elect representatives of their choice.

92 F.3d 283, 287-88 (5th Cir. 1996) (emphasis added).

However, regardless of how courts use the words interchangeably, the standards for *Gingles'* prongs two and three are distinctly different. Political cohesion can be demonstrated by "showing that a significant number of minority group members usually vote for the same candidates." *Gingles,* 478 U.S. at 56. White bloc voting on the

other hand requires the majority to vote in such a way that the majority "normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Id.* These standards are distinct and are employed for separate determinations.

In *Old Person,* the Ninth Circuit Court of Appeals held that "[e]lections between white and minority candidates are the most probative in determining the existence of legally significant white bloc voting." 230 F.3d at 1123-24; *see also Gingles,* 478 U.S. at 52, 61 n. 30, and 68. Moreover, "contests, occurring in the challenged districts and involving the same public offices subject to challenge, [are] more probative than election contests for other offices." *Old Person,* 230 F.3d at 1125. The trial record establishes a total of seven American Indian versus white elections were held in Blaine County, with American Indian voters voting cohesively for the Indian candidate. In five of the seven elections, the Indian candidate cohesively supported by American Indians in Blaine County was defeated by white bloc voting. The other two elections were congressional elections involving American Indian candidate Bill Yellowtail and in one of those, Yellowtail's margin of victory in Blaine County was 51% of the total votes casts after receiving support from 98% of the American Indian voters and 32% of white voters. The Court finds these seven elections represent strong evidence of legally significant polarized voting in Blaine County.

Evidence adduced at trial also establishes that the democratic party dominates local politics in Blaine County. Since at least 1986, Blaine County has not elected a single Republican to the office of County Commissioner, County Assessor, County Clerk and Recorder, Sheriff, County

Coroner, County Attorney, Justice of the Peace, Superintendent of Schools, State Senator or State Representative. This evidence supports Plaintiff's argument that where a single political party dominates the political process, minority voters cannot have a meaningful opportunity "to participate in the political process and to elect representatives of their choice" unless they are able achieve electoral success within the primary process. *White v. Regester,* 412 U.S. 755, 767 (1973). Of the five contested democratic primary elections for County Commission conducted since 1980, American Indian voters cohesively supported a preferred candidate. In all but one of those primary elections, the preferred American Indian candidate lost because of white bloc voting. The Court finds these results compelling evidence of legally significant polarized voting.

The only other elections in Blaine County where American Indian candidates have competed for non-Tribal offices are nineteen exogeneous elections for the Harlem School Board. These elections demonstrate overwhelmingly that American Indians cohesively supported Indian candidates over white candidates and that white voters preferred white candidates over Indian candidates, again supporting this Court's finding of political cohesion and white bloc voting.

The analysis of American Indian and white voting behavior in Blaine County generated through bivariate ecological regression analysis and homogeneous precinct analysis offered by the parties is entirely sufficient to support the Court's conclusion regarding polarized voting. *Gingles,* 478 U.S. at 52-53, 61-62. There is, however, additional non-statistical evidence of racial polarization relevant to the second and third prongs of *Gingles* which warrants consideration.

The systematic failure of the Blaine County Commission to appoint American Indians to boards, authorities and commissions illustrates how racial separation makes it more difficult for Indian candidates to solicit white votes. Evidence in this regard shows that out of eighty-five appointments in 1997, ninety-four appointments in 1998, eighty-five appointments in 1999 and eighty-five appointments in 2000, only three Commission appointments to local boards, authorities and commissions were filled by American Indians. Additionally, many social, civic, political and religious organizations are separated along racial lines in Blaine County making it more difficult for American Indians to establish contacts with potential white voters. Housing patterns in Blaine County which are generally divided along racial lines with the majority of American Indians living on the Fort Belknap Reservation and the majority of white residents living elsewhere, contributes to this division. Finally, Plaintiff presented evidence that American Indian candidates typically receive an "icy" reception from white citizens in Blaine County when they attempt to campaign door-to-door thereby inhibiting American Indian participation in what Defendants characterize as an expected form of campaigning throughout Blaine County.

On the basis of the foregoing, the Court concludes that Plaintiff has satisfied the three threshold *Gingles* factors by demonstrating that (1) the population of American Indians in Blaine County "is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) American Indians in Blaine County are "politically cohesive;" and (3) the white majority in Blaine County "votes sufficiently as a bloc to enable it – in the absence of special circumstances . . . usually to defeat

the minority's preferred candidate." *Gingles,* 478 U.S. at 50-51.

B. TOTALITY OF THE CIRCUMSTANCES

Having determined that Plaintiff has satisfied the three *Gingles* factors, the Court must determine the ultimate question of vote dilution by assessing whether, under the totality of circumstances, American Indians have been denied an equal opportunity to participate in the political process and to elect representatives of their choice in Blaine County. *Old Person* 230 F.3d at 1120. In making this assessment, the Court begins by considering the pertinent Senate factors specified in *Gingles:*

> These factors are not to be applied woodenly; as the Senate Judiciary Committee noted, and the Supreme Court has reiterated, "'the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality,' and on a 'functional' view of the political process." (citations omitted)

Old Person, 230 F.3d at 1129.

The Senate Factors

The first Senate factor calls upon the Court to consider the extent of any history of official discrimination in Montana, and more particularly in Blaine County, that touched the right of American Indians in Blaine County to register, to vote, or otherwise to participate in the democratic process. The history of discrimination against American Indians by the federal government and the State of Montana from the 1860's until as recently as 1971 was chronicled in detail in the Findings of Fact and Conclusions

of Law entered by the Honorable Paul G. Hatfield, United States District Judge, in *Old Person v. Cooney,* No. CV-96-004-GF, entered October 27, 1998, and upheld by the United States Court of Appeals for the Ninth Circuit in *Old Person.* 230 F.3d at 1129. Additionally, Plaintiff presented extensive testimony at trial relating to the history of official discrimination against American Indians in the State of Montana and specifically in Blaine County. Notwithstanding recent progress in reducing discrimination against American Indians in the State of Montana and in Blaine County, this Senate factor focuses on a prior history of discrimination. The Court finds that Plaintiff has met its burden under the first Senate factor.

The second Senate factor requires the Court to consider the extent to which elections in Blaine County are racially polarized. This Court has already made a finding that the evidence at trial demonstrates that despite political cohesion of American Indian voters in Blaine County, the white majority usually votes as a bloc to defeat the Indian-preferred candidate. The consistent relationship between the race of the voter in Blaine County and the way in which that voter votes, meets the racial polarization standard. *Gingles,* 478 U.S. at 53 n. 21. Therefore, the second Senate factor is met.

The third Senate factor involves the extent to which Blaine County has used voting practices or procedures that may enhance discrimination against American Indians. The Court finds this factor is established by Plaintiff as a result of Blaine County's use of the at-large county commission voting system. The at-large system has consistently resulted in the inability of American Indians to elect candidates of their choice.

The fourth Senate factor relating to whether American Indians have been denied access to a candidate slating process is not applicable in this case.

The fifth Senate factor concerns the extent to which American Indians bear the effects of discrimination in areas which hinder their ability to participate effectively in the political process. In considering this issue, the Court must look beyond the bounds of Blaine County. *Gomez,* 863 F.2d at 1418 (stating that a court must look beyond the city, county or district where the election took place and instead look at the statewide effects of discrimination). The evidence at trial establishes that Blaine County is the poorest county in Montana. That unfortunate fact makes the fifth Senate factor more difficult to assess. The Court finds, however, that Plaintiff has demonstrated that past discrimination against American Indians in Montana and in Blaine County has resulted in depressed socio-economic conditions which have hindered the ability of American Indians in Montana to participate fully in the political process. *Old Person,* 230 F.3d at 1129.

The sixth Senate factor looks to whether political campaigns in Blaine County have been characterized by overt or subtle racial appeals. Plaintiff introduced evidence of the removal of or damage to campaign signs erected on behalf of American Indian candidates in Blaine County. However, this evidence is not sufficient to demonstrate that political campaigns in Blaine County are characterized by overt or subtle racial appeals.

The Supreme Court held the seventh Senate factor, the extent to which American Indians have been elected to public office in Blaine County, is a highly probative indication of impermissible vote dilution. *Gingles,* 478 U.S. at

48-49 n.15; *Old Person,* 230 F.3d at 1128. The evidence presented at trial is compelling that American Indian electoral failure in Blaine County is nearly total. Blaine County has a total of thirteen countywide offices which include three county commissioners, a county assessor, a county clerk and recorder, a county clerk of the district court, a county coroner, a county attorney, two justices of the peace, a county sheriff, a county superintendent of schools, and a county treasurer. The trial record shows that With the exception of the election of Charles Hay as Blaine County Sheriff, no American Indians has ever been elected or appointed to any of the 13 elective offices in Blaine County.[4] The evidence at trial further establishes that several American Indians residing in Blaine County are qualified to serve on the Blaine County Commission. Nonetheless, only three candidates have run for the County Commission throughout its history, and none has done so in the past ten years. By comparison, electoral success of American Indians to the Harlem School Board has demonstrated that a pool of American Indian candidates exists and is willing to run for elective office where a fair chance of being elected exists.

In evaluating the evidentiary record with respect to the foregoing Senate factors, the Ninth Circuit Court of Appeals determined that "[t]he most important of the Senate factors are racial polarization, 'the extent to which voting in the elections of the state or political subdivision is racially polarized,' and proportional representation, 'the

[4] The evidence is inconclusive as to whether Sheriff Hay's Indian ancestry was known to the majority of voters of Blaine County, but the evidence also shows that his ancestry was not an issue at the time of his election.

extent to which [American Indians] have been elected to public office in the jurisdiction.' A third important factor is 'proportionality,' the relation of the number of majority-Indian voting districts to the American Indians' share of the relevant population." *Old Person,* 230 F.3d at 1128-29 (quoting *Gingles,* 478 U.S. at 48 n. 15 and citing *De Grandy,* 512 U.S. at 1014 n.11). Although the *Old Person* Court did not specify the origin of the proportionality requirement, the *De Grandy* Court cited § 1973(b) as the reason to include an analysis of proportionality in the totality of circumstances inquiry. *De Grandy,* 512 U.S. at 1000. Regardless of the origin of the standard, Plaintiff has shown significant polarized voting and a lack of proportional representation which strongly supports Plaintiff's claim of vote dilution.

Although the record at trial does not evidence a significant lack of responsiveness on the part of elected officials to the particularized needs of American Indian citizens of Blaine County, the Court finds that the policy underlying the County's use of the at-large election method for its County Commission is tenuous. In this regard, Defendants maintain that the at-large election method is warranted because it makes the Blaine County Commission responsible to the needs of the entire County. Nevertheless, Blaine County regards the residency conditions of each Commissioners as important. Appointments to County Board, Authorities and Commissions are made on the basis of the existing residency districts. Finally, each Commissioner is responsible for the maintenance of County roads within their respective residency districts. Blaine County Commissioner Don Swenson explained at trial that the purpose of the residency districts is to provide representation to the different interests and to the

different geographic areas within Blaine County. The record is thus clear that to some extent governance of Blaine County is already conducted on the basis of the Commissioner's subdistricts of residence.

The Court rejects Defendant's argument that this Court must find any adverse voting impact suffered by American Indians in Blaine County was the result of racial bias. Although, a plurality in *Gingles* rejected proof of intent to discriminate against minority voters to establish a § 2 violation, the issue remains disputed. *Gingles,* 478 U.S. at 43-44. On this issue, the Supreme Court plurality issued a strong statement. Justice Brennan's plurality opinion rejected any requirement of intent or causation in order to find vote dilution. *Id.* at 62-63, 70-71. In her concurrence, Justice O'Connor stated, "evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters . . . can never affect the overall vote dilution inquiry." *Id.* at 100 (O'Connor, J., concurring). Finally, Justice White joined Justice O'Connor in this view stating in his concurrence that "[u]nder Justice Brennan's test, there would be polarized voting and a likely § 2 violation of all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. . . . This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did." *Id.* at 83 (White, J., concurring). Taken together, all of the Justices concluded that no intent was required for a §2 violation.

In *Smith v. Salt River Project Agric. Improvement and Power Dist.,* the Ninth Circuit Court of Appeals weighed in

on the issue of intent and the results test. The case involved voting in an agricultural district where land ownership was required to be allowed to vote. The Ninth Circuit Court of Appeals concluded that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry. Instead, '[s]ection 2 plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result.'" 109 F.3d 586, 595 (9th Cir. 1997) (quoting *Ortiz v. City of Philadelphia Office of the City Comm'rs,* 28 F.3d 306, 312 (3d Cir. 1994)). However, in *Ruiz,* the Ninth Circuit tempered its view holding that "it seems clear that requiring proof of intentional discrimination or racist motives in any part of a vote dilution claim 'diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.'" *Ruiz,* 160 F.3d at 557 (quoting S. Rep. at 18). The Court went on to hold that "proof of groupwide or individual discriminatory motives has no part in a vote dilution claim." *Id.* Taken together, this Court concludes that an inference can be shown that racial bias operates "through the medium of the targeted electoral structure to impair minority political opportunities. . . . [but] the resultant inference is not immutable, but it is strong; it will endure *unless and until* the defendant adduces credible evidence tending to prove that detected voting patterns can mos. logically be explained by factors unconnected to the intersection of race with the electoral system." *Uno,* 72 F.3d at 983.

Finally, contrary to Defendants' assertion, Montana state law does not prevent Blaine County from changing the election method for its County Commission. Indeed, the Montana Constitution allows that local governments

must review procedural election requirements. Mont. Const. Art. XI, § 9. Montana law further provides a mechanism for a local government to review the Blaine County Commission's election method under the Montana Constitution. Mont. Code Ann. §§ 7-3-171 (1991). *See generally,* Mont. Code Ann. §§ 7-3-171 to 7-3-193 (1991). This mechanism allows for changes in the method of electing County Commissioners, including the adoption of single-member district plans, and has been adopted by several Montana counties. Indeed, Blaine County utilized a charter study commission in 1984 and 1994, but according to Commissioner Victor Miller, the charter commission did not give consideration to whether the at-large method of election resulted in dilution of Indian voting strength. Therefore, under the totality of circumstances, Blaine County's interest in maintaining the at-large method of election for its County Commission must be characterized as tenuous, particularly when compared to the overall interest in terminating the dilution of American Indian voting strength which results from the use of the at-large voting method for election of Blaine County Commissioners.

C. CONCLUSION REGARDING VOTE DILUTION

Having found that Plaintiff has established all three *Gingles* factors, and that the vast majority of the Senate factors weigh in favor of Plaintiff's claim, the Court concludes that under the totality of circumstances, American Indians in Blaine County are denied an equal opportunity to participate in the political process and to elect representatives of their choice as a result of the at-large method of election for members of the Blaine County Board of Commissioners in violation of § 2 of the Voting

Rights Act of 1965. Plaintiff's claims for declaratory and injunctive relief must, therefore, be granted.

ORDER

Therefore, for the reasons set forth in the foregoing Findings of Fact and Conclusions of Law, the Court concludes that Judgment must be entered in favor of Plaintiff.

IT IS THEREFORE ORDERED that Plaintiff's Complaint for a declaration that the existing at-large staggered term method of electing the Blaine County Board of Commissioners violates § 2 of the Voting Rights Act of 1965 is Granted.

IT IS FURTHER ORDERED that Defendants, their agents and successors in office, and all persons acting in concert with any of them, are hereby enjoined from administering, implementing, or conducting future elections for the Blaine County Commission under the at-large staggered term method of election.

IT IS FURTHER ORDERED that Defendants shall, not later than April 26, 2002, develop and file with the Court an election plan for the Blaine County Board of Commissioners that remedies the § 2 violation found to exist by these Findings of Fact and Conclusions of Law. In preparing the proposed election plan, counsel for Defendants shall forthwith meet and confer with counsel for Plaintiff in an effort to resolve issues regarding the form of election plan submitted to the Court by Defendants on or before April 26, 2002.

DATED: March 20, 2002

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

THE UNITED STATES OF AMERICA, Plaintiff, v. BLAINE COUNTY, MONTANA; DON K. SWENSON, ARTHUR KLEINJAN and VICTOR J. MILLER, in their official capacities as members of the Blaine County Board of Commissioners; and SANDRA BOARDMAN, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County, Montana, Defendants.	CV-S-99-122-GF-PMP *JUDGMENT* (Filed Mar. 21, 2002)

The Court having rendered a decision this date contained in the Court's Findings of Fact and Conclusions of Law,

JUDGMENT is hereby entered in favor of Plaintiff United States of America and against Defendants Blaine County, Montana, Don K. Swenson, Arthur Kleinjan and Victor J. Miller, in their official capacities as members of the Blaine County Board of Commissioners, and Sandra Boardman, in her official capacity as Clerk and Recorder

and Superintendent of Elections for Blaine County, Montana, as follows:

1. The Court declares that the existing at-large staggered term method of electing the Blaine County Board of Commissioners violates § 2 of the Voting Rights Act of 1965;

2. Defendants, their agents and successors in office, and all persons acting in concert with any of them, are hereby enjoined from administering, implementing, or conducting future elections for the Blaine County Commission under the at-large staggered term method of election;

3. Defendants shall, not later than April 26, 2002, develop and file with the Court an election plan for the Blaine County Board of Commissioner that remedies that § 2 violations found to exist by the Court's Findings of Fact and Conclusions of Law entered concurrent herewith. In preparing the proposed election plan, counsel for Defendants shall forthwith meet and confer with counsel for Plaintiff in an effort to resolve issues regarding the form of election plan submitted to the Court by Defendants on or before April 26, 2002.

DATED: March 20, 2002

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

157 F.Supp.2d 1145

United States District Court,
D. Montana,
Great Falls Division.

The UNITED STATES of America, Plaintiff,
v.
BLAINE COUNTY, Montana; Don K. Swenson, Arthur Kleinjan and Victor J. Miller, in their official capacities as members of the Blaine County Board of Commissioners; and Sandra Boardman, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County, Montana, Defendants.

No. CV99-122GFPMP.

July 23, 2001.

Christopher Coates, Joseph D. Rich, Sabrina Whitehead Jenkins, Avner Shapiro, Civil Rights Division, U.S. Department of Justice, Washington, D.C., Bill Mercer, Assistant U.S. Attorney, Missoula, for Plaintiff.

J. Scott Detamore, William Perry Pendley, Mountain States Legal Foundation, Denver, CO, Rebecca W. Watson, Gough, Shanahan, Johnson & Waterman, Helena, MT, for Defendants.

ORDER

PRO, District Judge.

I. INTRODUCTION

Before the Court for consideration is a Motion for Summary Judgment (Docs. # 23, # 24 and # 25) filed by

Defendants Blaine County, Montana, Don K. Swenson, Arthur Kleinjan, Victor Miller and Sandra Boardman (collectively referred to as "Blaine County") on January 31, 2001. Plaintiff United States of America ("United States") filed a Response to Defendants' Motion for Summary Judgment (Docs. # 30 and # 31) on February 28, 2001. Blaine County filed a Reply (Doc. # 35) on March 14, 2001.

On May 17, 2001, this case was reassigned from the United States District Court for the District of Montana, Great Falls Division to the United States District Court for the District of Nevada by order of Chief Judge Donald W. Molloy (Doc. # 47).

On July 6, 2001, this Court heard oral argument regarding Blaine County's Motion for Summary Judgment.

II. FACTUAL BACKGROUND

Blaine County, Montana is governed by a three member Board of Commissioners elected at large by all of the voters in the County. Candidates must reside in one of three districts, but the entire County elects each Commissioner. Commissioners are elected to six year terms, and the terms are staggered such that one County Commissioner position is open for election every two years.

According to the 1990 census, Blaine County has a total population of 6,728. The County is predominantly comprised of two ethnic groups, with 59.8% of Blaine

County residents being Caucasian, and 39.2% of residents being Native American.[1]

The United States contends that the current system of at-large apportionment has resulted in discrimination against Native Americans. To support this claim, they note that no Native American has served as a County Commissioner in the eighty-six year history of Blaine County. The United States asserts that if the present voting scheme was converted to single member districts, the Native American population is sufficiently numerous and geographically compact so that Native Americans would likely constitute a voting majority in one of the single member districts.

In its complaint, the United States alleges that Blaine County's current voting system violates § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1994), in that Native Americans have less opportunity than their Caucasian counterparts to elect representatives of their choice. Blaine County has filed the instant Motion for Summary Judgment alleging that the 1982 amendments to § 2 of the Voting Rights Act are unconstitutional on their face and unconstitutionally applied in this case.

III. LEGAL STANDARD FOR MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment is a procedure which terminates, without a trial, actions in which "there is no genuine issue as to any material fact and that the moving

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[1] Results from the 2000 census have not thus far been provided to the Court.

party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A summary judgment motion may be made in reliance on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *Id.*

The United States Supreme Court delineated Rule 56 in a trilogy of opinions rendered in 1986. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). According to the Court, the movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate " 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.,* 477 U.S. at 324, 106 S.Ct. 2548 (quoting Fed.R.Civ.P. 56(e)). In order to preclude a grant of summary judgment, the non-moving party must do more than show that there is some "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co.,* 475 U.S. at 586, 106 S.Ct. 1348. Rather, the non-moving party must set forth " 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 587, 106 S.Ct. 1348 (quoting Fed.R.Civ.P. 56(e)). The substantive law defines which facts are material. *Liberty Lobby,* 477 U.S. at 248, 106 S.Ct. 2505.

The court views all underlying facts in the light most favorable to the non-moving party. *Martinez v. City of Los Angeles,* 141 F.3d 1373, 1378 (9th Cir.1998) (citing *Matsushita Elec. Indus. Co.,* 475 U.S. at 587, 106 S.Ct. 1348).

Although the non-moving party has the burden of persuasion, the party moving for summary judgment has

the initial burden of showing the absence of a genuine issue of material fact. *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir.1996). That burden is met by showing an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325, 106 S.Ct. 2548. The burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Liberty Lobby,* 477 U.S. at 250, 106 S.Ct. 2505. In meeting this burden, parties seeking to defeat summary judgment cannot rest upon allegations of denials of pleadings, but must demonstrate a genuine issue for trial. *Brinson v. Linda Rose Joint Venture,* 53 F.3d 1044, 1049 (9th Cir.1995). Under Rule 56(e), the adverse party must allege specific facts supported by affidavit that raise triable issues. *Id.* Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *Keenan v. Allan,* 91 F.3d 1275, 1278 (9th Cir.1996).

IV. DISCUSSION

Blaine County claims that summary judgment is appropriate because § 2 of the Voting Rights Act is unconstitutional. It bases this assertion on the theory that § 2 violates the Tenth and Eleventh Amendments by excessively interfering with a state's right to conduct its own elections.

The Voting Rights Act of 1965 was adopted via Congress' power under the § 5 enforcement provision of the Fourteenth Amendment. Initially, Congress designed the Act to remedy literacy testing, poll taxes, and other devices used to disenfranchise black voters in the mid-1960's. While the Act was somewhat effective, eligible black voters continued to vote less frequently than their white counterparts.

Congress amended the Act in 1970 and 1975 to combat new tactics used to restrict minority voting in response to the 1965 legislation.

Prior to 1982 and after the United States Supreme Court's decision in *City of Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), a plaintiff under § 2 was required to show discriminatory intent on the part of state actors in order to prevail. This standard was difficult to meet in most cases, thus limiting the effectiveness of the Voting Rights Act. In 1982, Congress amended the Act once again. This time lessening the burden for plaintiffs claiming discrimination. Instead of proving discriminatory intent, a plaintiff needed to merely demonstrate discriminatory results under the 1982 amendments to the Act.

The constitutionality of the Voting Rights Act has been unsuccessfully challenged many times, both before and after the 1982 amendments. The Supreme Court addressed the issue of whether the Voting Rights Act was an excessive application of congressional power and, therefore, encroached on areas reserved to the states in *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). The Court held that the Voting Rights Act was an "appropriate means for carrying out Congress' constitutional responsibilities and [is] consonant with all other provisions of the Constitution." *Id.* at 308, 86 S.Ct. 803. In *U.S. v. Marengo County Comm'n,* 731 F.2d 1546 (11th Cir.1984), *cert. denied,* 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984), the Eleventh Circuit ruled that the 1982 amendments imposing the results, rather than intent, standard was constitutional. *Id.* at 1556. Additionally, in *Major v. Treen,* 574 F.Supp. 325, 343 (E.D.La.1983), the United States District Court for the

Eastern District of Louisiana upheld the constitutionality of the 1982 amendments.[2]

Congress is broadly empowered by § 2 of the Fifteenth Amendment to prohibit state action that, though itself does not violate § 1, but instead perpetuates the effects of past discrimination. *City of Rome v. United States,* 446 U.S. 156, 176, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980).

> "Congress seeks to protect the core values of these amendments through a remedial scheme that invalidates election systems that, although constitutionally permissible, might debase the amendments' guarantees. Congressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth amendments is unquestioned."

Jones v. City of Lubbock, 727 F.2d 364, 373 (5th Cir.1984). The Voting Rights Act seeks in part to remedy minority vote dilution created by state and local electoral systems. "We reject any assertion that the statute as amended applies only to formal barriers to access such as literacy or residency tests. The goal of the Voting Rights Act has always been to ensure an effective right of participation." *Marengo County,* 731 F.2d at 1556. In *Jordan v. Winter,* 604 F.Supp. 807, 812 (N.D.Miss.1984), *aff'd sub nom. Mississippi Republican Executive Comm. v. Brooks,* 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984), the court implemented a redistricting plan which addressed issues of racial bloc voting. The plaintiffs in that case established that voters in Mississippi voted for candidates on the basis

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[2] In its moving papers, Blaine County does not cite to any specific case finding that the 1982 amendments to the Voting Rights Act are unconstitutional. Nor is this Court aware of any such cases.

of race. *Id.* "[B]lacks consistently lose elections in Mississippi because the majority voters choose their preferred candidates on the basis of race. We therefore find racial bloc voting operates to dilute black voting strength. . . . " *Id.* at 812, 813; *see also, Rogers v. Lodge,* 458 U.S. 613, 623, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

Blaine County argues that the 1982 amendments to the Voting Rights Act are unconstitutional when applied to jurisdictions such as itself, where no historical specific evidence of voting discrimination has been identified or was relied upon in the legislative history of the 1982 amendments. The Supreme Court has previously held however, that such laws with national scope are valid exercises of Congressional authority. In *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272, (1970), the Supreme Court concluded that Congress had not exceeded its authority in enacting a five-year national ban on the use of qualification tests in both state and local elections. *Id.* at 154, 91 S.Ct. 260.

Blaine County claims that the Act is nevertheless unconstitutional in the wake of the recent Supreme Court decisions beginning with *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) and culminating with the recently decided *Bd. of Tr. of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The holdings in these cases limited the application of Congress' enforcement power under the Thirteenth, Fourteenth, and Fifteenth Amendments. However, these cases are distinguishable from the case before this Court.

For a law to be a valid exercise of Congressional power under § 5 of the Fourteenth Amendment, "[t]here must be

a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne,* 521 U.S. at 520, 117 S.Ct. 2157. This two-prong test, congruence and proportionality, has become the standard for evaluating laws passed under the enforcement provision of the Fourteenth Amendment.

Congruence refers to the relationship between the laws passed by Congress and the wrong Congress seeks to remedy. "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." *Id.* at 530, 117 S.Ct. 2157. The appropriateness of remedial measures must be considered in light of the evil presented. *Katzenbach,* 383 U.S. at 308, 86 S.Ct. 803. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 334, 86 S.Ct. 803. Thus, the Court has established that while Congress may enact remedial laws to address Fourteenth Amendment violations, the laws must be closely related to the harms addressed.

Proportionality is the second component of the two-prong test. In the recent Supreme Court cases cited by Blaine County, the Court was careful to examine whether the enacted legislation extended beyond the identified discrimination to adversely affect others who had not been guilty of conduct with discriminatory results. The ultimate purpose of the two-prong analysis is to ensure that Congressional acts passed under the § 5 enforcement power of the Constitution are limited to remedial measures, rather than substantive law.

In *Boerne,* the Supreme Court considered whether the Religious Freedom Restoration Act (RFRA), which prohibited

any law that had a substantial impact on the right of persons to practice their religion, was a constitutional application of the § 5 enforcement power. *Boerne,* 521 U.S. at 515, 516, 117 S.Ct. 2157. The Court held that it was not. *Id.* at 536, 117 S.Ct. 2157. The Court found that Congress had little factual basis for assessing the magnitude of the discriminatory conduct, thus making the showing of congruence impossible. *Id.* at 530, 117 S.Ct. 2157. Moreover, the RFRA could be broadly applied to limit actors who had never discriminated, thus failing to meet the proportionality prong of the constitutional test. *Id.* at 532, 117 S.Ct. 2157. The Court found the RFRA to be substantive, rather than remedial law, and thus an unconstitutional application of the § 5 power. *Id.*

The Court similarly found that Congress could not apply the Patent Remedy Act to the states in *Florida Prepaid Postsecondary Expense Bd. v. Coll. Sav. Bank,* 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). The Court held that such application was substantive legislation rather than enforcement. *Id.* at 647, 119 S.Ct. 2199. Again, Congress had little factual basis for identifying the wrong and had instituted a presumptively remedial scheme which made all states immediately open to suit in federal court for "all kinds of possible patent infringement and for an infinite duration." *Id.* at 647, 119 S.Ct. 2199. Thus, the Patent Remedy Act exceeded the enforcement powers granted to Congress under the Fourteenth Amendment. *Id.* The Court similarly invalidated other Congressional acts in *Coll. Sav. Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (invalidating application of the Trademark Infringement Act against states), and *Kimel v. Florida Board of Regents,* 528 U.S.

62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (invalidating application of the Age Discrimination in Employment Act against states).

Blaine County also relies on the Supreme Court's holding in *U.S. v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), which invalidated the Violence Against Women Act (VAWA). The Supreme Court in *Morrison* invalidated VAWA because it was directed not at states or state actors, but instead toward private conduct. *Id.* at 621, 120 S.Ct. 1740. The § 5 enforcement power deals only with Congress' enforcement against states, not against individuals. *Id.* While VAWA was directed at private conduct, the Voting Rights Act is directed at states and state actors and thus Blaine County's reliance on *Morrison* is misplaced. Although racial bloc voting giving rise to minority vote dilution can be a form of private discrimination, it is the perpetuation of such a system by state actors that runs afoul of the Voting Rights Act and the Constitution.

Most recently, the Supreme Court held that the Americans with Disabilities Act was an excessive application of § 5 enforcement power in *Bd. of Tr. of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866. Relying on prior equal protection precedent, the Court concluded that states were not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards the disabled had a rational basis. *Id.* at 972. Thus, legislation regarding special accommodations for the disabled would need to come from positive law and not through the enforcement power of § 5. *Id.* at 964. Moreover, Congress had not identified a history and pattern of unconstitutional

employment discrimination by the states against the disabled because its investigation and legislative history fell short of suggesting a pattern of unconstitutional discrimination on which Fourteenth Amendment legislation was required to be based. *Id.* at 967. Even if such a pattern of discrimination were shown, however, the rights and remedies in the ADA were not congruent and proportional to the targeted violation given the ADA's sweeping requirements. *Id.*

The Voting Rights Act is distinguishable from the aforementioned Acts held unconstitutional by the Supreme Court in two fundamental respects. First, Congress did have a factual basis for adopting not only the Voting Rights Act, but also its subsequent amendments. When adopting the Voting Rights Act, Congress had before it an extensive record of voting discrimination against minorities. *Katzenbach,* 383 U.S. at 310-12, 86 S.Ct. 803. Even so, Congress need not make specific findings concerning the severity or pervasiveness of voting discrimination each and every time it seeks to redress a purported wrong. *Mitchell,* at 147, 91 S.Ct. 260; *Fullilove v. Klutznick,* 448 U.S. 448, 503, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Powell, J. concurring). The fact that the Act was primarily intended to remedy discrimination against African Americans in the southern states in the 1960's does not make it any less proper to use as a remedy for discrimination against Native Americans today. There is ample evidence that American Indians have historically been the subject of discrimination in the area of voting. *See, e.g., Little Thunder v. South Dakota,* 518 F.2d 1253, (8th Cir.1975); *Goodluck v. Apache County,* 417 F.Supp. 13 (D.Ariz.1975); *Yanito v. Barber,* 348 F.Supp. 587 (D.Utah 1972); *Klahr v. Williams,* 339 F.Supp. 922 (D.Ariz.1972).

Moreover, the remedy here is proportional to the harm. First, as described above, the Supreme Court has affirmed Congressional authority to pass laws relating to voting discrimination that are national in scope. Second, the Voting Rights Act does not require that districts be drawn so that minorities are guaranteed representation. It merely requires that they be given an equal chance at electing minority representatives only after they have shown that discriminatory results are present as a result of suspect voting procedures. *42 U.S.C. § 1973* (1982). Thus, the Voting Rights Act satisfies the congruence and proportionality requirements for a valid exercise of § 5 power.

Finally, throughout the recent Supreme Court cases cited by the Blaine County, there exists an element missing that is present in this case. None of these recently decided Supreme Court cases addressed voting issues. This is significant in that equal opportunity for voting for all ethnic groups was a primary basis for the Fourteenth and Fifteenth Amendments. The Court finds Congress did not exceed its authority under the Civil War Amendments in crafting the Voting Rights Act which is designed to remedy the very harm of voting discrimination that the Amendments were adopted to prevent.

V. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Blaine County's Motion for Summary Judgment (Docs. # 23, # 24 and # 25) is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BLAINE COUNTY, Montana; et al., Defendants-Appellants, v. JOSEPH F. MCCONNELL; et al., Plaintiff-Intervenors-Appelles.	No. 02-35691 D.C. No. CV-99-00122-PMP District of Montana, Great Falls ORDER (Filed Sep. 7, 2004)

Before: WARDLAW, GOULD, and PAEZ, Circuit Judges.

The panel has voted to deny the appellants' petition for rehearing en banc. The full court has been advised of the appellants' petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b). Therefore, the petition for rehearing en banc is DENIED.

UNITED STATES CONSTITUTION AMENDMENT XIV.

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or

hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CONSTITUTION AMENDMENT XV.

UNIVERSAL MALE SUFFRAGE

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Section 2 of the Voting Rights Act (42 U.S.C. § 1973)

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 4 of the Voting Rights Act (42 U.S.C. § 1973b)

Suspension of the use of tests or devices in determining eligibility to vote

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court.

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless

the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action –

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory –

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I-A to I-C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United

States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has

been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of Title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Voting Rights Act Amendments of 1982.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Voting Rights Act Amendments of 1982.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section. Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register.

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State

which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable

in any court and shall be effective upon publication in the Federal Register.

(c) "Test or device" defined.

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices.

For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English.

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in

American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures.

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that,

where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or

voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 5 of the Voting Rights Act (42 U.S.C. § 1973c)

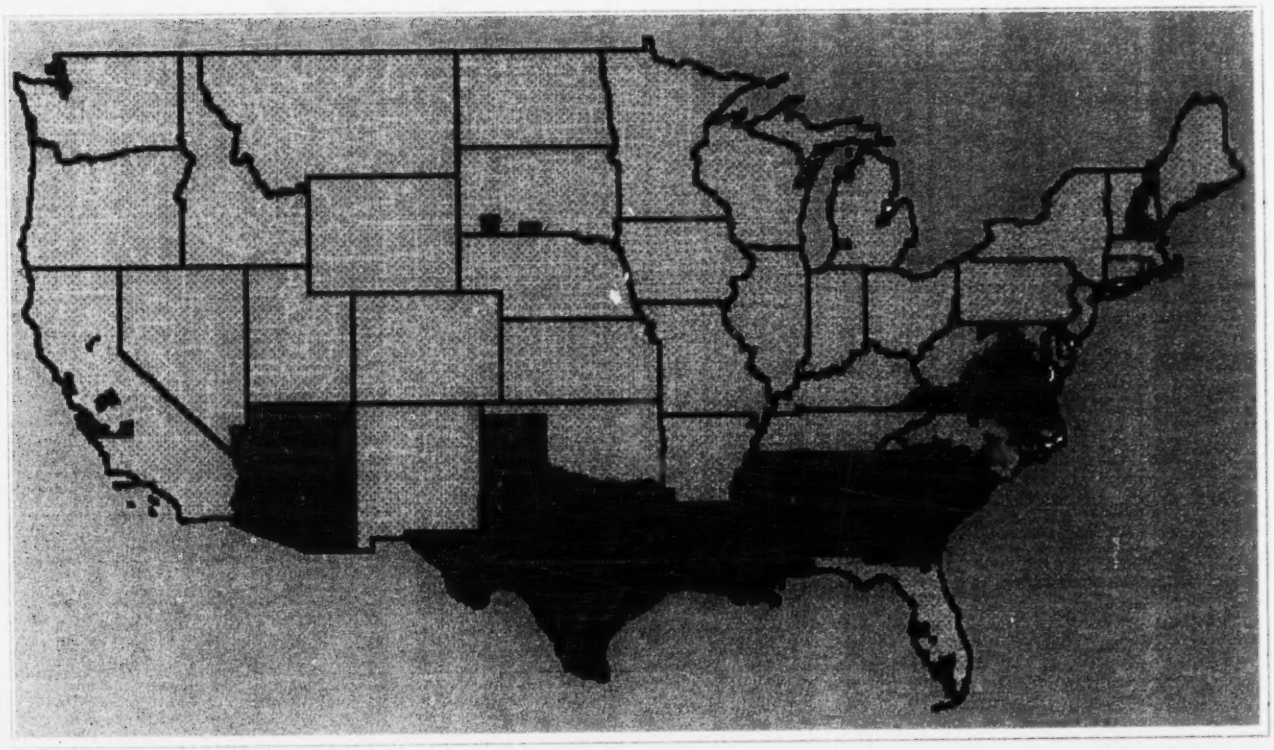
Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b), of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from

that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such

qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

1. **U.S. Department of Justice**
Civil Rights Division
Voting Section
2. **Section 5 Covered Jurisdictions**



Key: Covered Jurisdictions

States Covered as a Whole

Covered Counties in States Not Covered as a Whole

Covered Townships in States Not Covered as a Whole

States Covered as a Whole (In red on map)	Applicable Date	Fed Register	Date
Alabama	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Alaska (not shown above)	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Arizona	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Georgia	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Louisiana	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Mississippi	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
South Carolina	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Texas	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Virginia[1/]	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

Covered Counties in States Not Covered as a Whole (In blue on map)	Applicable Date	Fed Register	Date
California:			
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Merced County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Monterey County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Yuba County	Nov. 1, 1968	36 FR 5809	Mar. 27. 1971.
Yuba County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.

Florida:

Collier County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Hardee County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Hendry County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Hillsborough County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Monroe County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.

New York:

Bronx County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Bronx County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Kings County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
New York County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.

North Carolina:

Anson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Beaufort County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Bertie County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Bladen County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Camden County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966.
Caswell County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Chowan County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

Cleveland County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Craven County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Cumberland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Edgecombe County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Franklin County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Gaston County	Nov. 1, 1964	31 FR 5081	Mar. 29 1966.
Gates County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Granville County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Greene County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Guilford County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Halifax County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Harnett County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Hertford County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Hoke County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Jackson County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Lee County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Lenoir County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Martin County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966.
Nash County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

Northampton County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Onslow County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Pasquotank County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Perquimans County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966.
Person County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Pitt County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Robeson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Rockingham County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Scotland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Union County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Vance County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Washington County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966.
Wayne County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Wilson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

South Dakota:

Shanon County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.
Todd County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.

Covered Townships in States Not Covered as a Whole (In pink on map)		Applicable Date	Fed Register	Date
Michigan:				
Allegan County:	Clyde Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Saginaw County:	Buena Vista Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
New Hampshire:				
Cheshire County:	Rindge Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Coos County:	Millsfield Township	Nov. 1, 1968	39 FR 16912	May 10, 1974
	Pinkhams Grant	Nov. 1, 1968	39 FR 16912	May 10, 1974
	Stewartstown Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
	Stratford Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Grafton County:	Benton Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Hillsborough County:	Antrim Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Merrimack County:	Boscawen Town	Nov. 1, 1968	39 FR 16912	May 10, 1974

Rockingham County:	Newington Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Sullivan County:	Unity Town	Nov. 1, 1968	39 FR 16912	May 10, 1974

Notes

[1] Three political subdivisions in Virginia (Fairfax City, Frederick County and Shenandoah County) have "bailed out" from coverage pursuant to Section 4 of the Voting Rights Act The United States consented to the declaratory judgment in each of those cases.

Senate Factors

(S. Rep. No. 97-417, at 28-29 (1982),
reprinted in 1982 U.S.C.C.A.N. 177)

1. [T]he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction;

8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(2)

No. 04-775

IN THE
Supreme Court of the United States

BLAINE COUNTY, MONTANA; DON K. SWENSON, ARTHUR KLEINJAN, and MARY DELORES PLUMAGE, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Private Respondents in Opposition to Petition for Writ of Certiorari

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
BRYAN SELLS
MEREDITH E.B. BELL
ACLU Foundation, Inc.
2725 Harris Tower
233 Peachtree Street
Atlanta, GA 30303
(404) 523-2721

JIM VOGEL
P.O. Box 525
Hardin, MT 59034

Counsel for Private Respondents

QUESTIONS PRESENTED

1. Whether the lower court erred in following the decisions of this Court upholding the constitutionality of, and applying, Section 2 of the Voting Rights Act?

2. Whether this Court, absent a very obvious and exceptional showing of error, should review the concurrent findings of fact by two courts below that at-large elections for the Blaine County Board of Commissioners diluted American Indian voting strength in violation of Section 2 of the Voting Rights Act?

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BRIEF OF PRIVATE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Private respondents, Joseph F. McConnell, Franklin R. Perez, Candace D. De Celles, Cheryl Sears, Wesley D. Cochran, Linda M. Buck, Donald L. Long Knife, Daniel Kinsey, and Fort Belknap Community Council, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.

STATEMENT OF FACTS

This action was brought by the United States on November 16, 1999, under Sections 2 and 12(d) of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973j(d), challenging at-large elections for the Board of Commissioners of Blaine County, Montana. Private respondents are American Indians, who are residents and voters of Blaine County, and the Fort Belknap Community Council. The Community Council is the elected tribal government of the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Reservation.

Following trial on the merits the district court held that the challenged at-large system violated Section 2. Private respondents moved to intervene post-judgment, which was granted by the district court "for purposes of the remedy phase of the trial and any appeal with respect to the remedy phase of the trial only." A copy of the minute order granting and limiting intervention is included in the appendix hereto at 1a. After the submission of remedial plans by the parties, the district court adopted the plan submitted by the county providing three single member districts, one of which contained a majority of Indians of voting age, and ordered a special election in the majority Indian district. The defendants appealed and the court of appeals affirmed.[1]

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[1]Both the opinion of the court of appeals, *United States v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004), and the final judgment of the court of appeals list and acknowledge private respondents as "Plaintiff-Intervenors - Appellees." The court of appeals accepted private respondents' brief opposing the county's motion for a stay pending appeal but, and without stating any reasons therefor, granted the county's motion to strike

The Section 2 Analysis of the Lower Courts

Both the district court and court of appeals applied the analysis set out in *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986), in concluding that at-large elections for the Blaine County Commission diluted Indian voting strength in violation of Section 2 of the Voting Rights Act.

First, the district court found and the court of appeals agreed that Indians in Blaine County are "geographically compact" such that they could constitute a majority in one or more single member districts. App. 3, 44, 53. The county does not challenge that finding.

Second, the district court found and the court of appeals agreed that Indians in Blaine County are "politically cohesive." App. 24, 48, 53. According to the court of appeals, "the

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private respondents' merits brief. Private respondents submit that as intervenors they are properly before this Court. *See* S. Ct. Rule 12.6 ("[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court"). Assuming intervention was properly limited to the remedy phase of trial and any appeal therefrom, the county made the propriety of the remedy ordered by the district court an issue on appeal. The notice of appeal provides that Blaine County appeals "from that part of the Order providing that said districts are Single Member Commissioner Districts, and orders a special election in Single Member Commissioner District Number One, rather than at-large." Defendants' Notice of Appeal, July 12, 2002. In its application for a stay pending appeal, the county sought a stay of the order of the district court "which requires that Blaine County conduct a special election for a newly created, single-member Commissioner district." Defendants-Appellants' Urgent Motion Under Circuit Rule 27-3(b), For Stay Pending Appeal, p. 1. And in its brief on appeal, the county argued that the court of appeals "must reverse the ruling of the Trial Court," which necessarily included the remedy of single member districts and a special election. Appellants' Brief, p. 94. Private respondents, pursuant to the order of the district court, were properly before the court of appeals to defend the order of the trial court ordering a remedy consisting of single member districts and a special election, and as such were free, both in the court of appeals and this Court, to make any argument in support of the judgment below. *See Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481 (1976) (intervenors "may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record"); *Blum v. Bacon*, 457 U.S. 132, 138 n.5 (1982).

evidence "indisputably shows that American Indians consistently bloc vote." App. 23.

Third, the district court found and the court of appeals agreed that whites voted sufficiently as a bloc usually to defeat the candidates preferred by Indian voters. App. 24, 53. The court of appeals concluded that white bloc voting "precludes American Indians from electing candidates of their choice." App. 31.

Turning to the totality of circumstances, the courts below concluded that: (1) there was a history of official discrimination against Indians, including "extensive evidence of official discrimination by federal, state, and local governments against Montana's American Indian population;" (2) there was racially polarized voting which "made it impossible for an American Indian to succeed in an at-large election;" (3) voting procedures, including staggered terms of office and "the County's enormous size [which] makes it extremely difficult for American Indian candidates to campaign county-wide," enhanced the opportunities for discrimination against Indians; (4) depressed socio-economic conditions existed for Indians; (5) there was a tenuous justification for the at-large system, in that at-large elections were not required by state law while "the county government depends largely on residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions;" and (6) "American Indian electoral failure in Blaine County is nearly total." App. 4, 31-33, 54-57.

The courts below, after conducting a "searching practical evaluation" of local electoral conditions in Blaine County, as required by *Gingles*, 478 U.S. at 79, concluded that the challenged at-large system diluted Indian voting strength in violation of Section 2. App. 36, 61-62.

SUMMARY OF THE ARGUMENT

Section 2 of the Voting Rights Act has been held to be constitutional by this Court and has been repeatedly applied, both by this Court and the lower federal courts. There is no conflict between the holding of the court of appeals in this case

and any other circuit court concerning the constitutionality of Section 2.

In the *City of Boerne* line of cases, this Court not only did not cast doubt upon the constitutionality of Section 2, but repeatedly cited the Voting Rights Act as an example of the proper exercise of congressional power to enforce the Fourteenth and Fifteenth Amendments. The court of appeals in this case properly applied *Boerne* and its progeny.

The legislative history of Section 2 strongly supports the constitutionality of the statute. Congress had before it abundant evidence of the discriminatory use and effect of at-large elections. It also considered substantial evidence of discrimination in voting nationwide and against language minorities, including American Indians. In enacting Section 2, Congress could properly prohibit practices that do not themselves violate the Constitution as a means of enforcing the underlying constitutional guarantees.

Racial bias against Indians was shown to exist, but is not a prerequisite to establishing racially polarized voting or a violation of Section 2. Similarly, while Indians in Montana share a common history, including their reservation status, membership in distinctive tribes, a common socio-economic status, *etc.*, evidence that a significant number of Indians usually vote for the same candidates established political cohesion necessary to a Section 2 vote dilution claim.

The concurrent findings by the courts below that at-large elections for the county commission diluted minority voting strength were not "very obvious and exceptional error." Accordingly, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. Section 2 Has Been Held To Be Constitutional and Has Been Repeatedly Applied by This Court

Blaine County's principal argument that Section 2 is, or may be, unconstitutional is without merit. This Court affirmed

the constitutionality of Section 2 of the Voting Rights Act in *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), *aff'g Jordan v. Winter*, 604 F.Supp. 807 (N.D.Miss. 1984) (three-judge court). The three-judge district court, relying upon the legislative history and "judicial and scholarly interpretation" of the statute, rejected the defendant's contention that Section 2 "exceeds Congress's enforcement power under the fifteenth amendment." *Jordan v. Winter*, 604 F.Supp. at 810-11. One of the questions presented in the statement of jurisdiction to this Court on appeal was: "Whether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. at 1003 (Stevens, J., concurring).[2] In affirming the district court, this Court necessarily "rejec[ted] the specific challenges presented in the statement of jurisdiction." *Id.* (*quoting Mandel v. Bradley*, 432 U.S. 173, 176 (1977)). *See also Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (summary affirmance is a decision on the merits).

This Court subsequently construed and applied Section 2 in *Thornburg v. Gingles*. It invalidated four multi-member legislative districts in North Carolina on the ground that they impaired "the opportunity of black voters 'to participate in the political process and to elect representatives of their choice.'" 478 U.S. at 34. The Court would not have done so had it doubted the constitutionality of the statute or that the statute reached voting procedures that diluted minority voting strength.

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[2]The basic provisions of the Voting Rights Act of 1965 were enacted pursuant to Congress's powers under the Fifteenth Amendment, South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966), although Section 4(e) of the act, 42 U.S.C. § 1973b(e), was enacted to enforce the equal protection clause of the Fourteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966). Subsequent amendments and extensions of the act in 1970, 1975, and 1982, were pursuant to congressional authority to enforce both the Fourteenth and Fifteenth Amendments. *See Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970); S.Rep. No. 295, 94th Cong., 1st Sess. 35-6 (1975); S.Rep. No. 417, 97th Cong., 2d Sess. 35-6 (1982).

Moreover, the judgment of the Court in *Gingles* that the four districts violated Section 2 was unanimous.[3] Justice O'Connor, for example, in a concurring opinion joined by Chief Justice Burger and Justices Powell and Rehnquist, expressly "agree[d] with the Court that proof of vote dilution can establish a violation of § 2 as amended." 478 U.S. at 87. Again, the Court would not have reached the decision it did, nor concurred unanimously in the judgment that the four legislative districts violated Section 2, if it had doubts about the constitutionality of the statute.

In cases involving Section 2 decided by it subsequent to *Mississippi Republican Executive Committee v. Brooks* and *Gingles*, the Court has never expressed any doubts or reservations about the constitutionality of the statute and has consistently enforced the obligations it places upon the several States. *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (applying Section 2 to the method of electing appellate court judges); *Houston Lawyers' Ass'n v. Atty. Gen. of Texas*, 501 U.S. 419 (1991) (applying Section 2 to the method of electing state trial court judges); *Growe v. Emison*, 507 U.S. 25, 40 (1993) (applying Section 2 analysis to single member district plans); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (applying Section 2 analysis to claims of "influence" dilution); *Holder v. Hall*, 512 U.S. 874, 885-86, 951 n.3, 962-63 (1994) (rejecting any narrowing interpretation of Section 2); *Johnson v. De Grandy*, 512 U.S. 997 (1994) (applying Section 2 analysis to a state legislative redistricting plan); *Reno v. Bossier Parish School Board*, 520 U.S. 471, 486 (1997) (holding that discriminatory effects of dilution under Section 2 were relevant in determining whether there was a discriminatory purpose under Section 5); *Abrams v. Johnson*, 521 U.S. 74, 90 (1997) (noting that "Section 2 of the Voting Rights Act applies to any 'voting qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied by any State or political subdivision'" and applying Section 2 analysis to a court ordered redistricting plan); *Georgia v, Ashcroft*, 539 U.S.

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[3]The three dissenters, Justices Stevens, Marshall, and Blackmun, contended that a fifth challenged district, House District 23, also violated Section 2. 478 U.S. at 106.

461, 478 (2003) (confirming that "§ 2 applies to all States"); *Charleston County, S.C. v. United States*, 125 S. Ct. 606 (2004), *den'g cert. in* 365 F .3d 341 (4th Cir. 2004) (successful Section 2 challenge to at-large elections in Charleston County, South Carolina).

There is plainly no merit to the county's contention that the constitutionality of Section 2 "remains an open question." Pet. at 6.[4]

II. There Is No Conflict with the Second Circuit

Despite the county's claim, Pet. at 5, there is no conflict between the holding of the court in this case concerning the constitutionality of Section 2 and that of the Second Circuit in *Muntaqin v. Coombe*, 366 F.3d 102 (2d Cir. 2004). To the contrary, the panel in *Muntaqin* "note[d] at the outset that we do not in any way cast doubt on Congress's authority to enact the Voting Rights Act," that "the court of appeals that have squarely addressed the issue have concluded that § 1973, on its face, meets the requirements for 'appropriate legislation' under the Fourteenth and Fifteenth Amendments," and that "[w]e do not doubt this conclusion." *Id.* at 121. That court, citing *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974), declined to apply Section 2 to state law disfranchising currently incarcerated felons and parolees because the practice was sanctioned by the Fourteenth Amendment. *Muntaqin*, 366 F.3d at 122. No sanction exists for a county to dilute minority voting strength through use of at-large elections. Moreover, the panel opinion in *Muntaqin* has been vacated and the case set for rehearing *en banc*. 2004 WL 2998551 (2nd Cir. (N.Y.)).

The lower federal courts, in addition to the panel in *Muntaqin*, have unanimously affirmed the constitutionality of

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[4]As noted *infra*, the Court has consistently rejected challenges to other provisions of the Voting Rights Act. See *South Carolina v. Katzenbach*, 383 U.S. at 309; *Katzenbach v. Morgan*, 384 U.S. at 651; *Gaston County v. United States*, 395 U.S. 285, 287 (1969); *Oregon v,. Mitchell*, 400 U.S. at 118; *City of Rome v. United States*, 446 U.S. 156, 173 (1980).

Section 2. *See, e.g., Mixon v. Ohio*, 193 F.3d 389, 398 (6th Cir. 1999) ("Congress had the authority to regulate state and local voting though the provisions of the Voting Rights Act"); *United States v. Marengo County Commission*, 731 F.2d 1546, 1563 (11th Cir. 1984) ("[u]nder the test of *M'Culloch*, section 2 is 'consis[tent] with the letter and spirit of the constitution' . . . and is clearly constitutional"); *Jones v. City of Lubbock*, 727 F.2d 364, 373 (5th Cir. 1984) ("Congressional power to adopt prophylactic measures to vindicate the purposes of the fourteenth and fifteenth amendments is unquestioned"); *LULAC v. Clements*, 986 F.2d 728 (5th Cir. 1993) ("concerns of federalism must not be allowed to emasculate Congress' power to adopt prophylactic measures to vindicate the purposes of those Amendments"); *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996) (noting "the constitutionality of § 2"); *United States v. Blaine County, Montana*, 363 F.3d 897, 907 (9th Cir. 2004) ("Congress did not exceed its Fourteenth and Fifteenth Amendment enforcement powers by applying section 2 nationwide").

Given the decisions of the Court interpreting and applying Section 2, Justice O'Connor has concluded that "it would be irresponsible for a State to disregard the §2 results test." *Bush v. Vera*, 517 U.S. 952, 991 (1996) (O'Connor, J., concurring).[5] In light of its consistent application by the federal courts, there is no conflict among the circuits concerning the constitutionality of Section 2.

III. The Decision of the Ninth Circuit Is Not in Conflict with *Boerne* Through *Lane*

The county is wrong in claiming that recent decisions of this Court cast doubt upon the constitutionality of Section 2.[6]

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[5]Justice O'Connor further noted that while the Court had never granted plenary review of the constitutionality of the statute, "[i]n the 14 years since the enactment of § 2(b), we have interpreted and enforced the obligation that it places on States in a succession of cases." 517 U.S. at 990.

[6]The decisions relied upon by defendants are: City of Boerne v. Flores, 521 U.S. 507 (1997); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999); Kimel v.

None of the decisions cited by the county involved voting rights or discrimination based upon race. Indeed, to the extent that the cases discuss voting rights legislation at all, they cite them as examples of the proper exercise of congressional power to enforce the Fourteenth and Fifteenth Amendments.

In *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, because of an absence of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." However, the Court repeatedly cited the Voting Rights Act as an example of congressional legislation that *was* constitutional. *See, e.g.*, 521 U.S. at 518 (citing the Voting Rights Act's suspension of literacy tests as an appropriate measure enacted under the Fifteenth Amendment "to combat racial discrimination in voting"); *id.* at 518 (the seven year extension of Section 5 of the Voting Rights Act and the nationwide ban on literacy tests were "within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States"); *id.* at 532 (citing Section 5 of the Voting Rights Act as an "appropriate" measure "'adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against'" (*quoting Civil Rights Cases*, 109 U.S. 3, 13 (1883)). The Court described the various remedies imposed by the Voting Rights Act as "unprecedented," but deemed them "necessary given the ineffectiveness of the existing voting rights laws." 521 U.S. at 526. The county's argument that *City of Boerne* casts doubt upon the constitutionality of Section 2, or any other provision of the Voting Rights Act, cannot be seriously credited.

The Court in *City of Boerne* also contrasted the extensive record of discrimination compiled by Congress when it passed the Voting Rights Act with what it characterized as the scant record of discrimination supporting passage of RFRA.

Florida Board of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001); Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003); and Tennessee v. Lane, 124 S. Ct. 1978 (2004).

The evidence of discrimination in voting was "subsisting and pervasive." 521 U.S. at 525. The deprivation of constitutionally protected voting rights was "widespread and persisting." *Id.* at 526. Congress had before it "a long history" of disfranchisement of voters on account of their race. *Id.* at 526 (*quoting Oregon v. Mitchell*, 400 U.S. 112, 147 (1970) (opinion of Black, J.)). Congress acted in light of the "evil" of "racial discrimination [in voting] which in varying degrees manifests itself in every part of the country." *Id.* at 526 (*quoting Oregon v. Mitchell*, 400 U.S. at 284 (opinion of Stewart, J.). The legislative record disclosed "95 years of pervasive voting discrimination," *id.* at 526 (*quoting City of Rome v. United States*, 446 U.S. 156, 182 (1980)), and "modern instances of generally applicable laws passed because of [racial] bigotry." *Id.* at 530. By contrast the legislative history of RFRA, in the view of the Court, contained no such evidence, leading it to conclude that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. Again, any suggestion that *City of Boerne* casts doubt upon the constitutionality of Section 2, or any other provision of the Voting Rights Act, which the Court has repeatedly held was proportional to a remedial objective, must be discounted.

The burden of proof under Section 2 and RFRA are also totally different. Under RFRA, once a plaintiff showed a substantial burden on free exercise of religion, the state was required to demonstrate a compelling governmental interest and show that the law was the least restricting means of furthering that interest. *City of Boerne*, 521 U.S. at 533-34. Given the relative ease of establishing a substantial burden on free exercise, the Court concluded that the test under RFRA "'would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.'" *Id.* at 534 (*quoting Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888 (1990)). Under Section 2, by contrast, no voting practice is presumed to be in violation of the statute and there is no burden shifting. A plaintiff has the burden throughout of showing that a challenged voting practice, such as at-large elections, violates the statute. Any analogy between RFRA and Section 2 is inapt.

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999), also cited by defendants, is another case which neither involved voting rights nor racial discrimination. The Court invalidated the Patent Remedy Act, 35 U.S.C. §§ 271(h) & 296(a), allowing suits against a state because "Congress identified no pattern of patent infringement by the States, let alone a pattern of unconstitutional violations." *Florida Prepaid*, 527 U.S. at 640. But as in *City of Boerne*, the Court in *Florida Prepaid* expressly and repeatedly noted the constitutionality "of Congress' various voting rights measures" passed pursuant to the Fourteenth and Fifteenth Amendments, which it described as tailored to "remedying or preventing" discrimination based upon race. 527 U.S. at 639 and n.5.

Lest there be any doubt about the constitutionality of the Voting Rights Act, the Court in *Florida Prepaid* stressed that "[u]nlike the undisputed record of racial discrimination confronting Congress in the voting cases, . . . Congress came up with little evidence of [patent] infringing conduct on the part of the States." 527 U.S. at 640 (citation omitted). And to underscore the point, the Court repeated that "[t]he legislative record thus suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation." *Id.* at 645 (*quoting City of Boerne*, 521 U.S. at 526, and its references to congressional voting rights enactments). As is apparent, nothing in *Florida Prepaid* remotely suggests that Section 2 of the Voting Rights Act is unconstitutional.

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), also relied upon by defendants, invalidated the provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, which subjected states to suit for money damages for age discrimination. But nothing in the opinion suggests that Section 2 of the Voting Rights Act is unconstitutional. First, the Court held that classifications based upon age were unlike those based upon race, and that "age is not a suspect classification under the Equal Protection Clause." 528 U.S. at 83. Second, the Court held that states may discriminate on the basis of age if the classification "is

rationally related to a legitimate state interest." *Id.* Classifications based on race, however, are constitutional only if they are narrowly tailored to further a compelling governmental interest. *Id.* at 84. Age classifications, unlike racial classifications, are "presumptively rational." *Id.* Against this backdrop, the Court concluded that ADEA was not "responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 86 (*quoting City of Boerne*, 521 U.S. at 532). Precisely the opposite is true of Section 2 of the Voting Rights Act. *See South Carolina v. Katzenbach*, 383 U.S. at 309.

In addition, according to the Court in the legislative history of ADEA "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Kimel*, 528 U.S. at 89. Again, the opposite can be said of the Voting Rights Act, and *Kimel* is no authority for the county's claim that the Section 2 violates the Constitution.

In *United States v. Morrison*, 529 U.S. 598 (2000), another decision relied upon by the county, the Court invalidated a section of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, which provided civil penalties against private individuals who had committed criminal acts motivated by gender bias. The Court concluded that the disputed provision could not be upheld as a proper exercise of congressional power under § 5 of the Fourteenth Amendment because "it is directed not at any State or state actor, but at individuals." 529 U.S. at 626. Section 2 of the Voting Rights Act, by contrast, is by its express terms directed at states and state actors, *i.e.*, at "any State or political subdivision." It contains no provision for civil penalties or a cause of action against individual voters. Moreover, the Court cited as examples of the proper exercise of congressional power under the Fourteenth and Fifteenth Amendments the various voting rights laws found to be constitutional in *Katzenbach v. Morgan* and *South Carolina v. Katzenbach*. *Id.* Yet again, nothing in *United States v. Morrison* casts any doubt upon the constitutionality of Section 2 of the Voting Rights Act.

In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), also relied upon by the county,

the Court invalidated a portion of Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112(a), allowing state employees to recover money damages by reason of the state's failure to comply with the statute. The Court concluded that there was no evidence of a "pattern of unconstitutional discrimination on which § 5 [of the Fourteenth Amendment] legislation must be based." 531 U.S. at 370. However, the Court was careful to underscore the constitutionality of the Voting Rights Act and singled it out as a preeminent example of appropriate legislation enacted to enforce the race discrimination provisions of the Civil War Amendments in the area of voting. *Id.* at 373.

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003), another decision cited by the county, the Court affirmed the constitutionality of the family leave provisions of the Family and Maternal Leave Act, 29 U.S.C. §§ 2601-2654, noting that "state gender discrimination . . . triggers a heightened level of scrutiny." In doing so, it cited with approval the decisions in *Katzenbach v. Morgan*, *Oregon v. Mitchell*, and *South Carolina v. Katzenbach* , which rejected challenges to provisions of the Voting Rights Act as "as valid exercises of Congress' § 5 power [under the Fourteenth Amendment]." *Hibbs*, 538 U.S. at 738. Once again, nothing in *Hibbs* supports the argument that Section 2 is unconstitutional.

Finally, in *Tennessee v. Lane*, 124 S. Ct. 1978, 1994 (2004), the Court held that Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131-12165, as applied to the fundamental right of access to the courts, "constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." Yet again, nothing in *Lane* remotely suggests that Section 2 of the Voting Rights Act is unconstitutional.

None of the decisions of the Court cited by the county casts doubt on the constitutionality of Section 2. To the extent that they discuss legislation enacted by Congress pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments to redress the problem of racial discrimination in voting, they do so to affirm its constitutionality. The *Boerne*

line of cases thus removes, rather than raises, any questions about the constitutionality of Section 2.

A. The Court of Appeals Properly Applied the *Boerne* Line of Cases

There is no merit to the county's contention that the court of appeals "created its own tests that conflict with this Court's decisions in *Boerne* through *Lane*." Pet. at 12. To the contrary, the court of appeals followed *Boerne, et al.,* and held that "this line of authority strengthens the case for section 2's constitutionality." App. 12. It noted that "in the Supreme Court's congruence-and-proportionality opinions, the VRA stands out as the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments," that when *Boerne* "first announced the congruence-and-proportionality doctrine . . . it twice pointed to the VRA as the model for appropriate prophylactic legislation," and, citing *Hibbs*, *Garrett*, *Morrison*, and *Florida Prepaid*, that "the Court's subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act as the baseline for congruent and proportionate legislation." App. 12. The court of appeals did not ignore the *Boerne* line of cases; it expressly followed and applied them.

IV. The Legislative History Strongly Supports the Constitutionality of Section 2

In arguing that Section 2 may not be constitutionally applied nationwide, the county claims that the court of appeals did not "properly" examine the legislative history of Section 2, and that had it done so "it would have found that there was no evidence of a widespread pattern of purposeful voting discrimination outside jurisdictions subject to Section 5 of the VRA." Pet. at 16. While the county's argument is foreclosed by *Brooks* and the *Boerne* line of cases, which upheld the constitutionality of Section 2,[7] it should be noted that the

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[7] *Boerne*, for example, held that legislation enacted under § 5 of the Fourteenth Amendment, such as Section 2 of the Voting Rights Act, does not require "geographic restrictions." 521 U.S. at 533.

county's argument reflects a complete ignorance of the legislative history of the 1982 statute, as well as its predecessors.

When it enacted the Voting Rights Act in 1965, Congress documented a pervasive, chronic history of "unremitting and ingenious defiance of the Constitution" by many states in denying racial minorities the equal right to vote. *South Carolina v. Katzenbach*, 383 U.S. at 309. Although the Court expressed the hope that "millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live," *id.* at 337, the act in fact set off a new wave of purposeful discrimination against racial minorities. According to the 1982 Senate report:

> Following the dramatic rise in registration [after passage of the 1965 act], a broad array of dilution schemes were employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect had been to offset the gains at the ballot box under the Act.

S.Rep. No. 417, 97th Cong., 2d Sess. 6 (1982).[8]

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[8]The testimony and evidence before the Senate, particularly as it related to the discriminatory effect of at-large elections, was extensive and nationwide. *See, e.g., Voting Rights Act: Hearings Before the Senate Subcomm. on the Constitution of the Comm. of the Judiciary*, 97th Cong., 2d Sess. 208-09 (1982) (statement of U.S. Sen. Charles Mathias, Jr., of Maryland, observing that at-large elections "have been effectively deployed to dilute the impact of minority voters"); *id.* at 458 (testimony of Hon. Henry L. Marsh, Mayor of the City of Richmond, Virginia, describing the discriminatory effect of at-large elections in Virginia); *id.* at 802 (testimony

The House report noted similar instances of discrimination and widespread opposition to equal voting rights that followed passage of the 1965 act.

> Since the passage of the Act in 1965, reports presented by the U.S. Commission on Civil Rights, studies conducted by social and political scientists, and Congressional hearings have all identified discriminatory elements of the election process such as at-large elections, high fees and bonding requirements, shifts from elective to appointive office, majority vote run-off requirements, numbered posts, staggered terms, full slate voting requirements, residency requirements, annexations, retrocessions, incorporations, and malapportionment and racial gerry[mandering].

H.Rep. No. 227, 97th Cong., 1st Sess. 18 (1981).[9]

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of Armand Derfner, Esq. of the Joint Center for Political Studies, colloquy with Senator Hatch regarding at-large elections); *id.* at 960 (testimony of Prof. Norman Dorsen of the NYU School of Law, colloquy with Senator Hatch regarding at-large elections); *id.* at 993-995 (testimony of Rolando Rios, Legal Director of the Southwest Voter Registration Education Project, describing the discriminatory effect of at-large elections on Chicano voters); *id.* at 1189, 1201-04, 1209-10 (testimony of Frank R. Parker, Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, discussing at-large elections); *id.* at 1286 (testimony of Steve Suitts, Executive Director, Southern Regional Council, describing the discriminatory history of at-large elections in North Carolina); *id.* at 1430 (testimony of Archibald Cox, Chairman, Common Cause, discussing the effect of the proposed amendment on at-large elections); *id.* at 1674 (statement of U.S. Sen. Patrick Leahy of Vermont, discussing at-large elections).

[9]The testimony and evidence before the House concerning the discriminatory effect of at-large elections was also extensive. *See, e.g.*, 1 *Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 38-41 (1981) (testimony of Rolando L. Rios, Legal Director, Southwest Voter Registration Education Project, describing at-large elections as "the single most harmful device used against minorities); *id.* at 226-27 (testimony of State Sen. Julian Bond of Georgia, describing the discriminatory use of at-large elections in Georgia); *id.* at 401-02 (testimony

Congress also had before it, and considered, a number of court decisions documenting voting discrimination against Native Americans when it enacted the minority language provisions of the Voting Rights Act in 1975, which expressly extended coverage to Indians, and when it amended Section 2 in 1982. Those decisions included: *Klahr v. Williams*, 339 F. Supp. 922, 927 (D.Ariz. 1972) (finding that legislative redistricting in Arizona had been adopted for the purpose of diluting Indian voting strength), cited in *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and*

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of Rev. Curtis W. Harris, President of the Southern Christian Leadership Conference for the State of Virginia, describing the discriminatory effect of at-large elections in Hopewell, Virginia); *id.* at 452-53 (testimony of Prof. Richard Engstrom of the University of New Orleans, discussing the impact of at-large elections on minority voting strength); *id.* at 511-16, testimony of Frank R. Parker, Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, discussing the discriminatory impact of at-large voting in Mississippi); *id.* at 610-23 (testimony of Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union Foundation, Inc., discussing the discriminatory effect of at-large elections generally); *id.* at 790-99 (testimony of Abigail Turner, Esq., describing the discriminatory effect of at-large elections in Alabama); 2 *Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 942-49 (1981) (testimony of Joaquin G. Avila, Associate Counsel, Mexican American Legal Defense and Educational Fund, describing the discriminatory effect of at-large elections in Texas); *id.* at 1767-68 (testimony of Arthur S. Fleming, Chairman, U.S. Comm'n on Civil Rights, describing the discriminatory effect of at-large elections); *id.* at 1797 (testimony of Raymond Brown, Southern Regional Council, describing the discriminatory effect of at-large elections); 3 *Extension of the Voting Rights Act: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 1901 (1981) (testimony of David Dunbar, General Counsel, National Congress of American Indians, discussing the discriminatory effect of at-large elections on American Indians); *id.* at 2007-08 (testimony of Professor C. Vann Woodward of Yale University, observing that at-large elections were "clearly motivated by racial purposes"); *id.* at 2038 (testimony of James U. Blacksher, Esq., describing at-large elections as "the principal barrier" to equal political participation for minority voters); *id.* at 2749-68 (testimony of Prof. Peyton McCrary of the University of South Alabama, detailing the discriminatory history of at-large elections in Mobile, Alabama). The House report also noted counties in New Mexico and Nebraska which were successfully sued "for attempting to dilute the Indian vote by instituting at-large election voting schemes." H.Rep. No. 227 at 19.

Constitutional Rights of the House Judiciary Comm., 94th Cong., 1st Sess., Appendix 1225-30 (1975) (hereinafter "*1975 House Hearings*"); *Oregon v. Mitchell*, 400 U.S. at 147 (literacy "tests have been used at times as a discriminatory weapon against . . . American Indians") (Douglas, J., concurring), cited in Cong. Rec. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards); *Goodluck v. Apache County*, 417 F.Supp. 13 (D.Ariz. 1975) (finding that a county redistricting plan had been adopted to diminish Indian voting strength), cited in *1975 House Hearings*, Appendix 1225-30, and in Cong. Rec. H4709 (daily ed. June 2, 1975) (statement of Rep. Young); *United States v. Humboldt County, Nev.*, Civ. No. R 70-0144 HEC (D.Nev. 1979) (finding that registrars discriminated against Indians in voter registration), cited in H.Rep. No. 227 at 16; *United States v. Board of Supervisors of Thurston County, Neb.*, Civ. No. 79-0-380 (D.Neb. 1979) (at-large elections diluted Indian voting strength), cited in H.Rep. No. 227 at 19; *United States v. San Juan County*, Civ. No. 79-507 (D.N.M. 1979) (at-large elections diluted Indian voting strength), cited in H.Rep. No. 227 at 19; and, *United States v. Bartleme, Wi.* , Civ. No. 78-C-101 (E.D.Wis. 1978) (finding purposeful discrimination against Indians in voting), cited in H.Rep. No. 227 at 19.[10]

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[10]During the 1975 hearings and debates, members of Congress noted the need to expand the coverage of the Voting Rights Act to Indians. Rep. Peter Rodino, chair of the House Judiciary Committee, said that during subcommittee hearings members of language minority groups, including American Indians, related "instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation." Cong. Rec. H4711 (daily ed. June 2, 1975) (statement by Rep. Rodino). According to Rodino, "[t]he entire situation of these uncovered jurisdictions is tragically reminiscent of the earlier and, in some respects, current problems experienced by blacks in currently covered areas." *Id.* Rep. Robert Drinan noted similarly during the floor debate that there was "evidence that American Indians do suffer from extensive infringement of their voting rights," and that the Department of Justice "has been involved in 33 cases involving discrimination against Indians since 1970." Cong. Rec. H4825 (daily ed. June 3, 1975) (statement of Rep. Drinan). During debate in the senate, Senator William Scott read into the record a document entitled "Prejudice and Discrimination in American History" prepared by the Library of Congress, to the effect that: "Discrimination of the most basic kind has been directed against the American Indian from the day that settlers from Europe set foot upon American shores. . . . [A]s late as 1948 certain Indians

Congress, moreover, does not act in a vacuum. It proceeded against a full backdrop of information and expertise acquired through a host of other legislative acts. In the years before the 1982 amendments to the Voting Rights Act, Congress conducted dozens of oversight hearings on Indian affairs and enacted several major new laws protecting Native Americans. *See, e.g.*, Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978); Indian Claims Commission Act Amendment, Pub. L. No. 95-243, 92 Stat. 153 (1978); Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976); Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968), *reprinted in* VI Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1124 (1975); Indian Education Act, Pub. L. No. 92-318, 86 Stat. 235, 334-45 (1972).

Congress also enacted legislation to redress the myriad problems facing the Indian community in housing, health care, and economics. *E.g.*, The Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1770, 1806 (1970); The Headstart, Economic Opportunity, and Community Partnership Act of 1975, Pub. L. No. 93-644, 88 Stat. 2291, 2323 (1975); Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400 (1976). In 1977, the American Indian Policy Review Commission reported that "[n]o matter where Indians live, the pattern is essentially the same. Incomes are lower than that of the population at large, with more Indians below the poverty level." United States, American Indian Policy Review Commission, *Final Report* 91 (1977). Congress was entitled to draw upon this and other experience in concluding that Native Americans everywhere ought to be included within the protections of the Voting Rights Act. *See Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980) (observing that Congress may properly consider "information and expertise that Congress acquires in the consideration and enactment of earlier legislation") (Powell, J.,

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were still refused the right to vote. The resulting distress of Indians is as severe as that of any group discriminated against in American society." Cong. Rec. S13603 (daily ed. July 24, 1975) (statement of Sen. Scott).

concurring).

Federal courts have uniformly entertained Section 2 claims brought by American Indians, whether or not the jurisdiction in question was covered by Section 5. *See, e.g., Old Person v. Cooney*, 230 F.3d 113 (9th Cir. 2000) (applying Section 2 to a challenge to legislative redistricting brought by tribal members in Montana); *Windy Boy v. County of Big Horn*, 647 F.Supp. 1002 (D.Wyo. 1986) (invalidating at-large elections in Big Horn County, Wyoming, as diluting Indian voting strength); *Cuthair v. Montezuma-Cortez, Colorado School District No. RE-1*, 7 F.Supp. 2d 1152, 1165 (D.Col. 1998) (concluding that "Plaintiffs here [of the Ute Mountain Ute Tribe] are members of a class of citizens protected by § 1973(a)"); *Buckanaga v. Sisseton Independent School District No. 54-5*, 804 F.2d 469, 471 (8th Cir. 1986) (applying Section 2 to a vote dilution claim brought by Sioux Indians in South Dakota); *Stabler v. County of Thurston, Neb.*, 129 F.3d 1015, 1020 (8th Cir. 1997) (applying Section 2 to voting claims brought by tribal members and residents of the Omaha and Winnebago Indian Reservations in Nebraska); *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001) (Section 2 vote dilution case brought by Sioux Indians in South Dakota); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004) (Section 2 challenge brought by tribal members to state legislative redistricting). There is no credible basis for arguing that Section 2 is unconstitutional as applied to Blaine County or any other jurisdiction not covered by Section 5.

The fact that Congress did not make particularized findings with respect to every single jurisdiction covered by Section 2 is immaterial. This Court has recognized that Congress can exercise its enforcement powers under the Fourteenth and Fifteenth Amendments to reach even those jurisdictions with no proven history of discrimination. In *Oregon v. Mitchell*, for example, the Court upheld the nationwide ban on literacy tests even though there were no findings of nationwide discrimination, let alone that literacy tests had been used to discriminate in every jurisdiction of the country. *See* S.Rep. No. 417 at 43. The Court has recognized that in the interests of uniformity in the application of the law, Congress "may paint with a much broader brush" than the

Court itself, which is confined to cases and controversies based upon particular factual records. *Oregon v. Mitchell*, 400 U.S. at 284.

A remedy such as Section 2 reflects an awareness that the problem of discrimination in voting manifests itself in varying degrees in every part of the country, and "that the problem is a national one and reflects a national commitment to its solution." *Oregon v. Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part). *See also id.* at 216 (in upholding the nationwide ban on literacy tests "Congress could have determined that racial prejudice is prevalent throughout the Nation") (Harlan, J., concurring); *City of Boerne*, 521 U.S. at 526 (racial discrimination in voting "in varying degrees manifests itself in every part of the country") (*quoting Oregon v. Mitchell*).

The nationwide application of Section 2 also recognizes that minority residents of areas where discrimination has been pervasive may migrate to other areas of the country. The disadvantages they have suffered in education, employment, income, *etc.* may continue to hinder their ability to participate in the political process despite the absence of discrimination in their new locations. The power of Congress "to remedy the evils resulting from state-sponsored racial discrimination does not end when the subject of that discrimination removes himself from the jurisdiction in which the injury occurred." *Oregon v. Mitchell*, 400 U.S. at 233 (opinion of Brennan, White, and Marshall, JJ.)

In view of the legislative history, Section 2 was an appropriate exercise of congressional power. Defendants' argument that there is no evidence to support the nationwide application of Section 2 is unconvincing and unavailing.

A. Congress May Dispense with Proof of a Discriminatory Purpose

Despite the county's claim that "Congress may not prohibit facially neutral conduct," Pet. at 20, it was plainly within the power of Congress to enact a law invalidating voting practices that result in discrimination without regard for the

reasons they were enacted or are being maintained. While Congress has no power to amend the Constitution, it does have power to enact statutes that prohibit practices that do not themselves violate the Constitution as a means of enforcing the underlying constitutional guarantees.

In *South Carolina v. Katzenbach*, various Southern states challenged the constitutionality of several provisions of the Voting Rights Act of 1965: Section 5, the suspension of literacy tests in the covered jurisdictions, and the use of federal examiners to register voters. The Court held that all the challenged practices were constitutional, despite the fact that Section 5 prohibited the use of new voting practices or procedures that had only a discriminatory effect, and despite the fact that the Court had earlier held that literacy tests were not *per se* violations of the Fourteenth and Fifteenth Amendments. *See Lassiter v. Northampton County School Board of Elections*, 360 U.S. 45, 52 (1959). The Court concluded that the challenged provisions were appropriate measures enacted by Congress pursuant to Section 2 of the Fifteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. at 309.

In *Katzenbach v. Morgan*, the Court rejected a challenge by the State of New York to the constitutionality of Section 4(e) of the Voting Rights Act of 1965, which prohibited the use of literacy tests to persons educated in Puerto Rico. New York argued that § 4(e) could not be sustained as appropriate legislation to enforce the Fourteenth Amendment "unless the judiciary decided—even with the guidance of a congressional judgment—[that the literacy test] . . . is forbidden by the Equal Protection Clause itself." 384 U.S. at 648. The Court disagreed. It held that requiring proof of a constitutional violation as a condition for enforcing § 4(e)

> would deprecate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional.

384 U.S. at 648-49. Legislation enacted to enforce the Fourteenth Amendment was constitutional, according to the Court, if it could find that it "is plainly adapted to [the] end" of enforcing the equal protection clause and "is not prohibited by but is consistent with 'the letter and spirit of the Constitution,'" regardless whether the practices outlawed by Congress themselves violated the equal protection clause. *Id.* at 651 (*quoting McCulloch v. Maryland,* 17 U.S. 316, 421 (1819)).

The Court rejected a similar contention by Gaston County, North Carolina, which argued that the 1965 Voting Rights Act's ban on literacy tests should not be applied because the county had not used any such test during the preceding five years to discriminate against anyone on account of race or color. *Gaston County v. United States*, 395 U.S. 285, 287 (1969). The Court accepted the county's representations as true, but, pointing to the history of discrimination in education in the county, concluded that "'[i]mpartial' administration of the literacy test today would serve only to perpetuate these inequities [in education] in a different form." 395 U.S. at 297.

Similarly, in *Oregon v. Mitchell*, 400 U.S. at 118, 216, the Court unanimously rejected a challenge by Arizona to the 1970 amendment of the Voting Rights Act which made the ban on literacy tests nationwide. In a concurring opinion, Justice Harlan explained that:

> Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

400 U.S. at 216.

In *City of Rome v. United States*, the Court rejected a challenge to the constitutionality of Section 5, as extended by

Congress in 1975. It held that "Congress may, under the authority of §2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of §1, perpetuates the effects of past discrimination," or "create[s] the risk of purposeful discrimination." 446 U.S. at 176-77. *City of Boerne*, moreover, recognized that Congress, pursuant to its power to enforce the Fourteenth Amendment, may pass a law which "prohibits conduct which is not itself unconstitutional." 521 U.S. at 518.

After conducting extensive hearings in 1981 and 1982, Congress concluded:

> (1) that the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred unless the results test proposed for section 2 is adopted; and (2) that voting practices and procedures that have discriminatory results perpetuate the effects of past discrimination.

S.Rep. No. 417 at 40. Congress plainly has the power to prohibit the use of voting practices that result in discrimination, whether or not such practices would violate the discriminatory purpose standards of the Fourteenth or Fifteenth Amendments. There is no merit to Blaine County's contention that Section 2 is unconstitutional because it does not require a showing of official intentional discrimination or private racial bias.

V. Racial Bias Was Shown to Exist But Is not a Prerequisite for a Finding of Vote Dilution

The county argues that Section 2 requires proof of "invidious racial bias in the community" which "interacts with," or causes, at-large voting to dilute minority voting strength. Pet. at 25. Clearly, and as found by the lower courts, the record in this case contains abundant evidence of racial bias in the community towards Indians. Although it would take volumes to catalogue the extent, discrimination against Indians

has been at least as pervasive and insidious as that practiced against blacks in the South. That history is discussed in many places, including in United States Commission on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* (1981).

More specifically, in Montana, as in other western states, Indian land was confiscated and tribal members were confined on reservations. *See, e.g., Blackfeet and Fort Belknap Reservations in the State of Montana v. United States*, 81 Ct. Cl. 101 (1935). In finding that there was a history of discrimination against Indians in Montana and Blaine County, the district court took special note of the findings of the trial court in *Old Person v. Cooney*, No. CV-96-004-GF (D.Mont. Oct. 27, 1998), which were affirmed by the court of appeals in *Old Person*, 230 F.3d at 1129. App. 55. The trial court in *Old Person* found that during territorial days the Montana legislature: excluded Indians from voting; made it a crime to establish a voting precinct on any Indian Reservation, agency, or trading post; and denied Indians the right to serve on grand and trial juries. Slip op. at 40. When it became a state, Montana continued to deny Indians the right to vote, Mont. Const. art. IX, § 2 (1889), 1911 Mont. Laws 12th Sess., § 21 at 223, 238-40, and denied them the right to hold certain public offices. Mont. Const. art. V, § 3, art. VII, § 3, art. VIII, § 10, art. XIV, § 1 (1889). Between 1903 and 1921, the legislature adopted a number of resolutions seeking to open the Fort Belknap and other Indian Reservations in the state to settlement by whites. *Old Person v. Cooney*, slip op. at 41. Between 1903 and 1951, the legislature passed laws prohibiting Indians from carrying firearms outside a reservation and prohibited the sale of intoxicating liquors to Indians. *Id.* Only taxpayers could vote in certain elections, which disfranchised most Indians living on reservations. 1933 Mont. Laws 23rd Sess., Chap. 101 at 551-52. After Indians were given the right to vote by federal law, the state adopted burdensome registration and purge laws, 1937 Mont. Laws, 25th Sess., Chap. 147 § 562 at 476-77, and required registrars to be taxpayers. *Id.* at Chap. 172 at 523-27. Until 1941, state law prohibited the establishment of voting precincts "within or at the premises of any Indian agency or trading post." 1941 Mont. Laws, Chap. 8.

The state legislature itself has acknowledged that

Indians in

> Montana have been driven from their native valleys and plains and are at present living and residing upon reservations set apart . . . and by virtue of said isolation and supervision by the federal government, great problems of economic and social significance have arisen and presently exist, and that no suitable progress has been made to solve such problems.

1951 Mont. Laws, 32nd Sess., Chap. 203 at 489-83. The legislature further noted that "Indians of Montana are now subjected to various discriminatory laws . . . under which our first Americans are denied rights enjoyed by their fellow citizens of other races." *Id.* at 752-53. The legislature has described the "suffering, great hardship and poverty" of Montana Indians as an "embarrassment and disgrace." 1957 Mont. Laws, 35th Sess., at 768-70. The conditions under which Indians lived were said to be "deplorable and far below the standards of the rest of the state" in housing, safety, health, decency, and employment. 1969 Mont. Laws, 41st Sess., at 1166-68. The Fort Belknap Indian community faced "serious financial difficulty." 1974 Mont. Laws, 43rd 2d Sess., at 1666-67. Indian children were "caught in a network of mutually reinforcing handicaps ranging from material poverty to racism, illness, geographical and social isolation, language and cultural barriers, and simple hunger." 1975 Mont. Laws, 44th Sess., at 1723-24.

The court of appeals in *Old Person* acknowledged that:

> There was a history of discrimination by the federal government and the State of Montana from the 1860s until as recently as 1971. American Indians have a lower socio-economic status than whites in Montana; these social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process.

230 F.3d at 1129.[11]

The courts below were well aware of the history of discrimination and racial bias towards Indians from the white majority and took it into account in finding a violation of Section 2. However, there is no requirement under Section 2 that a plaintiff prove that racial bias is in fact the cause of polarized voting. The Court held in *Gingles*, 478 U.S. at 62-3, that "[f]or purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. . . . [T]he reasons black and white voters vote differently have no relevance to the central inquiry of § 2."[12] The lower courts have consistently applied this standard. *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998) ("Section 2 'requires proof only of a discriminatory result, not of discriminatory intent'" (*quoting Smith v. Salt River Project Agr. Imp. and Power Dist.*, 109 F.3d 586, 594 (9th Cir. 1997)); *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 935 (4th Cir. 1987) ("racially polarized voting looks only to the difference between how majority votes and minority votes were cast; it does not ask why those votes were cast the way they were, nor whether there were other factors present in contested elections"); *Sanchez v. State of Colorado*, 97 F.3d at 1315-16 (the district court erred in adopting the "mistaken view that why voters vote a certain way answers *Gingles*' question about the existence of racial bloc voting").

There is nothing, moreover, in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), which dismissed a challenge to multi-member districts in Indiana, that requires a plaintiff to prove, as the

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[11]The court in *Windy Boy* made similar findings: "Indians have lost their land, had their economics disrupted and have been denigrated by the policies of the government at all levels. . . . Reduced participation and reduced effective participation of Indians in local politics can be explained by many factors . . . but the lingering effects of past discrimination is certainly one of those factors." 647 F.Supp. at 1016-017.

[12]Justice O'Connor, while she believed that causation could be relevant to the overall vote dilution inquiry, agreed that "defendants cannot rebut this showing [of political cohesion and legally significant white bloc voting] by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race." 478 U.S. at 100.

county contends, that white bloc voting is caused by racial bias in order to establish vote dilution under Section 2. First, the claim in *Whitcomb* was based exclusively upon the equal protection clause of the Fourteenth Amendment, and the Court stressed that there was a lack of evidence that the challenged districts "were conceived or operated as purposeful devices to further racial or economic discrimination." 403 U.S. at 149. Second, the results test codified in Section 2 was taken, not from *Whitcomb*, but from *White v. Regester*, 412 U.S. 755, 766 (1973), S.Rep. No. 417 at 2, 28, which invalidated multi-member districts in Texas because they denied minorities the equal opportunity "to participate in the political processes and to elect legislators of their choice." Third, the legislative history of the amendment of Section 2 provides that "the specific intent of this amendment is that the plaintiff may choose to establish discriminatory results without proving any kind of discriminatory purpose." S.Rep. No. 417 at 28. One of the primary reasons Congress rejected the intent test was because it "is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." *Id.* at 36. Requiring a plaintiff to prove that invidious racial discrimination was the cause of white bloc voting would require that the white community be labeled as racist, would be deeply divisive, and would reintroduce a requirement of showing racial purpose contrary to the intent of Congress in amending Section 2. In *Gingles* the Court made it clear that plaintiffs "need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent." 478 U.S. at 74.

While plaintiff proved that voting was significantly driven by race, it was not required to do so.

A. The Record Clearly Establishes Political Cohesion

Although the lower court, relying upon *Gingles*, 468 U.S. at 31, correctly held that "a showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim," App. 24, political cohesion

is also established in this case by the common history shared by Indians, including their reservation status, their membership in distinctive tribes, their depressed socio-economic status, their special needs, and their consistent voting patterns. In light of the record before the lower courts, the county's argument, Pet. 28, that there was no non-statistical evidence of political cohesion is frivolous.

VI. The Concurrent Findings by Two Courts Below of a Section 2 Violation Were not "Very Obvious and Exceptional Error"

This Court has held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *Accord, Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996). In this case, there is no very obvious and exceptional showing that the findings of the courts below of the factors identified in *Gingles*, 478 U.S. at 50-1, and the Senate report, S.Rep. No. 417 at 28-9, as probative of minority vote dilution, as well as its ultimate finding of a Section 2 violation, were erroneous.

As the lower courts found, Indians in Blaine County are geographically compact and politically cohesive within the meaning of *Gingles*. The courts also found that Indian preferred candidates are usually defeated by white bloc voting. While proof of the *Gingles* factors is not conclusive, the Court in *Johnson v. DeGrandy*, 512 U.S. at 1012 and n.10, held that "lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors."

In addition to the *Gingles* conditions, the courts below found that plaintiffs proved other factors under the totality of circumstances analysis which demonstrated that the at-large system violated Section 2. Those factors included: a history of official discrimination against Indians; racially polarized voting; voting procedures which enhanced the opportunities for discrimination against Indians; depressed socio-economic conditions of Indians; a tenuous justification for the at-large

system; and the absence of Indians from elected office. App. 4, 31-33, 54-57.

As is apparent, there is no merit to the county's erroneous claim, Pet. at 22, that the lower court relied upon only two of the Senate factors in finding a Section 2 violation. To the contrary, the court of appeals, citing *Gingles*, 478 U.S. at 45, correctly held that "the ultimate 'question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process.'" App. 10.

There is no very obvious and exceptional showing that the findings of the lower courts of a Section 2 violation were error. Under the circumstances, the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, private respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

LAUGHLIN McDONALD
Counsel of Record
NEIL BRADLEY
BRYAN SELLS
MEREDITH E. B. BELL
ACLU Foundation, Inc.
2725 Harris Tower
233 Peachtree Street
Atlanta, Georgia 30303
(404) 523-2721

Jim Vogel
P.O. Box 525
Hardin, Montana 59034

Counsel for Private Respondents

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. BLAINE COUNTY, MONTANA, et al., Defendants.	CV-99-122-GF-PMP Minutes of the Court Dated: April 16, 2002

Present: THE HONORABLE PHILIP M. PRO, United States District Judge

DEPUTY CLERK: Donna Andrews REPORTER: Erica Davis

COUNSEL FOR PLAINTIFF: Christopher Coates, Sabrina Whitehead Jenkins

COUNSEL FOR DEFENDANTS: J. Scott Detamore

COUNSEL FOR INTERVENORS: Laughlin McDonald

PROCEEDINGS: TELEPHONIC HEARING ON INTERVENORS MOTION FOR LEAVE TO INTERVENE AFTER JUDGMENT AS PLAINTIFFS

10:00 a.m. Court convenes. Counsel are present telephonically.

The Court hears the representations of counsel on the Motion to Intervene.

The Court places its findings of fact on the record.

IT IS ORDERED the Motion for Leave to Intervene is **granted** for purposes of the remedy phase of the trial; and any

appeal with respect to the remedy phase of the trial only.

The Court confers with counsel on the status of the redistricting.

10:15 a.m. Court adjourns.

LOU ALEKSICH, JR., CLERK
By

Donna Andrews
Deputy Clerk

FEB 9 - 2005

No. 04-775

In the Supreme Court of the United States

BLAINE COUNTY, MONTANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

R. ALEXANDER ACOSTA
Assistant Attorney General

MARK L. GROSS
LISA WILSON EDWARDS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, is a constitutional exercise of Congress's powers under the Constitution.

2. Whether the evidence was sufficient in this case to support the judgment that petitioners' at-large voting system violated Section 2.

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In the Supreme Court of the United States

No. 04-775

BLAINE COUNTY, MONTANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 363 F.3d 897. The opinion of the district court granting summary judgment to respondents (Pet. App. 66-78) is reported at 157 F. Supp. 2d 1145. The findings of fact and conclusions of law and order and final judgment of the district court (Pet. App. 37-65) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2004. A petition for rehearing was denied on September 7, 2004 (Pet. App. 79). The petition for a writ of certiorari was filed on December 6, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed suit against Blaine County, the Blaine County Commission and its members, and the Blaine County Superintendent of Elections (collectively, the County), alleging that the County's at-large method of electing the three-member Commission dilutes American Indian voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

1. Section 2 prohibits States or localities from imposing or applying any standard, practice, or procedure "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973(a). A violation of that provision is "established if * * * it is shown that the political processes leading to nomination or election * * * are not equally open to participation by members of [a class of citizens] * * * in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

Claims that at-large or multi-member elections dilute minority voting strength in violation of Section 2 are governed by the framework set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The Section 2 inquiry requires that three preconditions be met. The minority group population must be "sufficiently large and geographically compact to constitute a majority in a single member district," the members of the minority group must be "politically cohesive," and it must be shown that the "majority votes sufficiently as a bloc to enable it—in the absence of special circumstances * * * usually

to defeat the minority's preferred candidate." *Id.* at 50-51; see *Growe* v. *Emison*, 507 U.S. 25, 39-40 (1993).

Proof of those three factors tends to show that the challenged at-large electoral structure itself "operates to minimize or cancel out" the ability of minority voters "to elect their preferred candidates." *Gingles*, 478 U.S. at 48; see *e.g.*, *Jenkins* v. *Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993), cert. denied, 512 U.S. 1252 (1994); *NAACP* v. *Niagara Falls*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995). The ultimate issue of vote dilution is a factual one to be determined based on the totality of circumstances in a particular jurisdiction. *Johnson* v. *De Grandy*, 512 U.S. 997, 1011-1012 (1994). The Senate Report accompanying the 1982 amendments to Section 2 lists a number of additional factors relevant to that analysis.[1]

2. Petitioners moved for summary judgment, arguing that Section 2 of the Voting Rights Act was unconstitutional. The motion was denied. Pet. App. 70-78. The district court held that Section 2 of the Voting Rights Act is a valid exercise of congressional authority. *Id.* at

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[1] Those factors include the history of official voting-related discrimination in the relevant political subdivision at issue; the extent to which voting in that political subdivision is racially polarized; the extent to which the relevant political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political processes; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. S. Rep. No. 417, 97th Cong., 2d Sess. 28-39 (1982).

78. The district court found that Congress acted on the basis of "an extensive record of voting discrimination against minorities," including "ample evidence that American Indians have historically been the subject of discrimination." *Id.* at 77. The district court also held that Section 2 is "proportional," because it "does not require that districts be drawn so that minorities are guaranteed representation," but "merely requires that they be given an equal chance at electing minority representatives only after they have shown that discriminatory results are present as a result of suspect voting procedures." *Id.* at 78.

3. A bench trial followed. The evidence at trial showed that Blaine County is governed by a three-member Board of Commissioners elected at-large. Candidates for County Commission run for office from residency districts, such that each commissioner must reside in one of three different residential districts. Each Commissioner is elected by the voters of the entire County, not just by voters within the candidate's residential district. Commissioners are elected to six-year, staggered terms. Elections are conducted every two years on a partisan basis. Pet. App. 3, 67.

Blaine County is 4638 square miles and has a population of 7009 persons, 52.6% white and 45.2% American Indian. Pet. App. 2, 38; U.S. Exhs. 27, 28. The voting age population of 4722 persons is 59.4% white and 38.8% American Indian. Pet. App. 2, 38; U.S. Exhs. 27, 28. Before this lawsuit against the County, no American Indian had ever been elected to the County Commission. Pet. App. 68.

4. On March 21, 2002, the district court entered findings of fact and conclusions of law that the at-large method of electing county commissioners in Blaine

County diluted minority voting strength in violation of Section 2. Pet. App. 37.

a. The district court determined that the three *Gingles* preconditions were met. Pet. App. 44-54. It was undisputed that the first factor was satisfied—*i.e.*, that the American Indian population in Blaine County is sufficiently compact and numerous to form a majority in a single-member district. *Id.* at 44.

With respect to the second factor, the court found that American Indians are politically cohesive. The court found that, on average, "89% of American Indians voted for the same candidate" in 14 county-wide elections and that the same "cohesive voting pattern" existed in 19 school board elections in the Harlem School District, Pet. App. 46—"an area of high American Indian concentration within Blaine County," *id.* at 23. The court considered petitioners' argument that "American Indians in Blaine County * * * lack group interests," but found that "[t]he evidence presented at trial shows the contrary." *Id.* at 47. Similarly, the court rejected as "not supported by the evidence adduced at trial" petitioners' contention that American Indians have relatively low voter turnout because the County Commission "plays only a limited role in their lives." *Ibid.*

The district court held that the third *Gingles* precondition was satisfied, because there was "compelling evidence of legally significant polarized voting." Pet. App. 52. In seven local general elections that involved American Indian and white candidates, "American Indian voters vot[ed] cohesively for the Indian candidate," and in "five of [those] elections, the Indian candidate cohesively supported by American Indians * * * was defeated by white bloc voting." *Id.* at 51. The court explained that the "other two elections were congressio-

nal elections involving American Indian candidate Bill Yellowtail," whose "margin of victory in Blaine County was 51% of the total votes cast after receiving support from 98% of the American Indian voters and 32% of white voters." *Ibid.* The district court found those results confirmed by "five contested Democratic primary elections for County Commission conducted since 1980," in which white bloc voting defeated the candidate preferred by American Indian voters four times. *Id.* at 52. The district court further found that the elections for the Harlem School Board show that "American Indians cohesively supported Indian candidates over white candidates and that white voters preferred white candidates over Indian candidates." *Ibid.*

b. The district court also found evidence to support other factors identified in the Senate Report, see p. 3 n.1, *supra*, including a history of official discrimination against American Indians by the State and County, Pet. App. 54-55, racially polarized voting, *id.* at 55, the consistent use of an at-large election method that hinders the ability of American Indians to elect candidates of their choice, *ibid.*, past discrimination that "has resulted in depressed socio-economic conditions which have hindered the ability of American Indians * * * to participate fully in the political process," *id.* at 56, and the near total absence of American Indian elected officials, *id.* at 56-57. The district court also found that "the policy underlying the County's use of the at-large election method for its County Commission is tenuous." *Id.* at 58.

5. The court of appeals affirmed. Pet. App. 1-36. The court held that this Court's summary affirmance of the constitutionality of Section 2 in *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002

(1984), aff'g *Jordan* v. *Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984) (3-judge district court), binds the lower courts. Pet. App. 10-11. The court determined that there "have been no doctrinal developments that suggest [the court] should ignore the Supreme Court's summary affirmance of Section 2's constitutionality." *Id.* at 12. The court further observed that *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and other recent decisions concerning the scope of Congress's enforcement authority, "strengthen[] the case for section 2's constitutionality." Pet. App. 12-13. The court held that, even if it could ignore this Court's summary affirmance, as petitioners argued it should, it would still hold Section 2 constitutional. *Id.* at 13.

Petitioners challenged the constitutionality of Section 2 on two grounds—that Congress had insufficient evidence of discrimination to apply Section 2 nationwide and that the Constitution requires Section 2 plaintiffs to prove intentional discrimination. The court of appeals rejected both arguments.

a. Petitioners' challenge to the nationwide application of Section 2 was based on the "limited geographic scope" of "section 5 of the [Act]," which goes beyond the prohibitions of Section 2 by imposing "sweeping preclearance requirements" to "changes in voting procedures" in "jurisdictions with a recent history of using voting tests and devices to deny the right to vote." Pet. App. 14. The court of appeals explained that Section 5 is an "extraordinary measure which requires covered jurisdictions to submit every change in their voting procedures to the Department of Justice for preclearance," and "places the burden of proof on the state or locality, not on the party challenging the voting procedure." *Id.* at 15. The court held that since Section

5 "imposes such a significant burden on state and local governments, Congress had reason to limit its application to jurisdictions with a recent history of pervasive voting discrimination." *Ibid.*

The court explained that, in contrast to Section 5, "Section 2 is a far more modest remedy," since the "burden of proof is on the plaintiff, not the state or locality," and Section 2 "makes no assumptions about a history of discrimination." Pet. App. 15-16. Furthermore "plaintiffs [in Section 2 cases] must not only prove compactness, cohesion, and white bloc voting, but also satisfy the totality-of-the-circumstances test." *Id.* at 16 (citing *Gingles*, 478 U.S. at 48-50).

The court of appeals further concluded that the constitutionality of Section 2 is supported by this Court's holding that the Voting Rights Act's "nationwide ban on literacy tests" is constitutional, Pet. App. 16, despite the fact that "literacy tests are not *per se* unconstitutional." *Ibid.* (citing *Oregon* v. *Mitchell*, 400 U.S. 112 (1970)). The court observed that Section 2 "is more limited than the literacy test ban upheld in *Mitchell* because it does not label any procedure as impermissible *per se*." *Ibid.* Finally, the court of appeals held that "after the Supreme Court's recent decision in *Nevada* v. *Hibbs*, it is clear that Congress need not document evidence of constitutional violations in every state to adopt a statute that has nationwide applicability." *Ibid.* (citing *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003)). Citing the legislative history of Section 2, the court held that "even if nationwide evidence were a prerequisite to national utilization of Section 2, Congress had before it sufficient evidence of discrimination in jurisdictions not covered by Section 5 to warrant nationwide application." *Id.* at 17. The court thus con-

cluded that Congress did not exceed its enforcement powers by applying Section 2 nationwide. *Ibid.*

b. The court of appeals also rejected petitioners' argument that Section 2 exceeds Congress's constitutional authority because the Constitution proscribes only intentional discrimination. Pet. App. 18. The court observed that the "most obvious problem with [petitioners'] argument is that on the exact same day that the Court issued its opinion in *Bolden*, the Court also held in *City of Rome* v. *United States* that section 5 of the VRA could constitutionally be applied to electoral procedures that only had discriminatory results and were not motivated by discriminatory intent." Pet. App. 18 (citing *City of Rome* v. *United States*, 446 U.S. 156, 173-178 (1980)). The court held that "under *City of Rome*, Congress can prohibit voting requirements that have discriminatory results." *Id.* at 19. Based on Congress's "extensive hearings and debate on all facets of the Voting Rights Act and [its] conclu[sion] that the 'results' test was necessary to secure the right to vote and to eliminate the effects of past purposeful discrimination," the court held that the results test is a "constitutional exercise of Congress's Fourteenth and Fifteenth Amendment enforcement powers." *Id.* at 22.

c. On the merits of the case, the court of appeals held that evidence presented at trial was sufficient to support the district court's ruling that the County's at-large election method violated Section 2. The presence of the first *Gingles* precondition was undisputed. With respect to the other two preconditions, the court of appeals held that evidence presented by "[b]oth sides' experts" established that American Indians vote cohesively, and the United States's expert evidence established that "white voters frequently vote as a bloc, which precludes

American Indians from electing candidates of their choice." Pet. App. 31.

Petitioners argued that in assessing political cohesion, the second *Gingles* precondition, plaintiffs must show evidence of "distinct political concerns" among minority voters. Pet. App. 24. The court of appeals rejected that argument, stating that petitioners "misconstrue[] the inquiry for racial bloc voting" and that "it is actual voting patterns, not subjective interpretations of a minority group's political interests, that informs the political cohesiveness analysis." *Ibid.* (citing *Gingles*, 478 U.S. at 31). The court of appeals also noted that petitioners' argument "would force courts to second guess voters' understanding of their own best interests." *Ibid.*

The court of appeals rejected petitioners' argument that low voter turnout among American Indians proves lack of political cohesion, noting that low turnout may itself be caused by a Section 2 violation consisting in the lack of ability of minority group members to participate effectively in the political process. Pet. App. 25. The court also rejected petitioners' contention that a white voter cohesion level of more than 60% is necessary to show that there is white bloc voting under the third *Gingles* precondition. *Id.* at 26. The court of appeals observed that petitioners' theory "flatly ignores the test laid out in *Gingles*," which "rejected a blanket numerical threshold for white bloc voting because * * * [t]he amount of white bloc voting that can generally minimize or cancel black voters' ability to elect representatives of their choice * * * will vary from district to district according to a number of factors." *Ibid.* (quoting *Gingles*, 478 U.S. at 56).

Finally, the court of appeals upheld the district court's finding that the totality of the circumstances demonstrate a violation of Section 2. Citing a history of state discrimination against the exercise of the franchise by American Indians continuing through 1963, the court held that "the district court's conclusion that there was a history of official discrimination against American Indians in Montana was not clearly erroneous." Pet. App. 30. The court rejected petitioners' argument that there was no evidence to satisfy the third Senate factor, stating that the County's use of "staggered terms" and its "enormous size" makes it extremely difficult for American Indian candidates to get elected. *Id.* at 31-32. The court of appeals held that the fifth Senate factor was satisfied based on evidence of disparities in poverty, graduation, unemployment and vehicle-ownership rates, between American Indian and non-Indian County residents. *Id.* at 32.

The court of appeals rejected petitioners' claim that other factors preclude a liability determination under Section 2. The court rejected petitioners' contention "that American Indians are unwilling to run for office," stating "that American Indians frequently run for the Harlem School Board, which demonstrates that there is a pool of qualified American Indian candidates." Pet. App. 32. The court of appeals also rejected as tenuous petitioners' argument that at-large elections are necessary to ensure that "county commissioners [are] responsive to voters throughout Blaine County," since "the county government depends largely on residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions." *Id.* at 33.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Contrary to petitioners' contention (Pet. 8-21), the court of appeals correctly held that Section 2 is a constitutional exercise of Congress's power under the Fourteenth and Fifteenth Amendments.

a. In *Brooks*, this Court summarily affirmed the decision of the three-judge district court in *Jordan* v. *Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984), that the "results" test of the amended Section 2 is constitutional. The jurisdictional statement in *Brooks* presented the question "[w]hether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." See 469 U.S. at 1003 (Stevens, J., concurring) (quoting 83-1722 J.S. at i). The Court's summary affirmance necessarily "reject[ed] the specific challenges presented in the statement of jurisdiction." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). It therefore necessarily established that the amended Section 2, including its results test, is a valid exercise of Congress's powers.

b. Petitioners argue (Pet. 9-21) that *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and the cases that have followed it have so altered the legal analysis of Congress's powers under the enforcement clauses of the Civil War Amendments that *Brooks* should be overruled. As the court of appeals recognized, however, at the same time that the Court has refined its analysis of Congress's powers under those Amendments, it has consistently cited various provisions of the Voting Rights Act

as "the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments." Pet. App. 12-13.

In *Boerne*, for example, the Court explained that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" 521 U.S. at 518.[2] Illustrating that principle, the Court referred to provisions of the Voting Rights Act that suspended literacy tests on a nationwide basis "despite the facial constitutionality of the tests" under this Court's cases. *Ibid.* The Court also illustrated that principle by referring to the extension of Section 5 of the Voting Rights Act, which plainly precludes covered jurisdictions from putting into effect changes in law that would otherwise be perfectly constitutional. *Ibid.*; see *id.* at 525-526 (same).

The reasoning of *Boerne* refutes petitioners' contention (Pet. 19-21, 24-27) that the amended Section 2 is unconstitutional unless it requires direct proof of discriminatory intent. The Court reinforced that conclusion in *Tenneessee* v. *Lane*, 124 S. Ct. 1978, 1985-1986 (2004), where it noted that Congress may "enact

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[2] Accord *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (recognizing that Congress's power under Section 5 of the Fourteenth Amendment is "not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment" and that "Congress' power 'to enforce' the Fourteenth Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text"); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 638 (1999).

prophylactic legislation proscribing practices that are discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause." The Court in *Lane* also noted that it had held in *Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), that the Family Medical Leave Act is a "valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose." 124 S. Ct. at 1986. See *Chisom* v. *Roemer*, 501 U.S. 380, 394 (1991) ("Under the amended [Section 2], proof of intent is no longer required to prove a § 2 violation.").[3]

c. Petitioners argue (Pet. 16) that Section 2 does not satisfy *Boerne* because "there was no evidence of a widespread pattern of purposeful voting discrimination outside jurisdictions subject to Section 5 of the [Voting Rights Act]" when Congress enacted and amended

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[3] Moreover, even as the Court has developed *Boerne*'s "congruence and proportionality" standard in later cases, the Court has continued to refer to various provisions of the Voting Rights Act as examples of constitutional exercises of Congress's power. See, *e.g.*, *Hibbs*, 538 U.S. at 737-738 (noting that "serious and intractable proble[ms]" in voting rights context "justify added prophylactic measures in response") (internal quotation marks omitted); *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373 (2001) (contrasting "constitutional shortcomings" of Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, in that case with "Congress' efforts in the Voting Rights Act of 1965 to respond to a serious pattern of constitutional violations"); *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. at 640 (contrasting statute providing for patent remedies that exceeded Congress's power with "the undisputed record of racial discrimination confronting Congress" that supported the constitutionality of the Voting Rights Act). Indeed, even Justices who view the Court's Section 5 cases as granting Congress too much authority distinguish the Voting Rights Act. See *Lane*, 124 S. Ct. at 2010-2012 (Scalia, J., dissenting).

Section 2 as a nationwide measure. This Court's decisions reject petitioners' requirement that a nationwide record of violations akin to the record of voting discrimination in jurisdictions covered by Section 5 is necessary before Congress can employ its enforcement powers on a nationwide basis, and Congress in any event had sufficient evidence before it to support the constitutionality of the amended Section 2.

(i) Petitioners' argument was rejected in *Hibbs*. In that case, the Court upheld the constitutionality of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2612(a)(1)(C), in the face of a similar challenge. As the court of appeals observed, this Court in *Hibbs* found that "important shortcomings of *some* state policies," Pet. App. 16 (quoting *Hibbs*, 538 U.S. at 733), showed "sufficient evidence of constitutional violations by the states" to find that the Act was a valid exercise of Congress's enforcement powers. *Ibid.* *Hibbs* recognized that despite the absence of specific state-by-state findings of discrimination, the "States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 [of the Fourteenth Amendment] legislation" with nationwide application. 538 U.S. at 735; see *id.* at 742 (Scalia, J., dissenting) ("Today's opinion for the Court does not even attempt to demonstrate that each one of the 50 States covered by [the FMLA] was in violation of the Fourteenth Amendment."); see also *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding nationwide ban on literacy tests despite lack of evidence that such tests had been used to discriminate in every State). The Court has never required Congress to make state-by-state or region-by-region findings prior to

employing its enforcement powers under the Civil War Amendments to adopt nationwide remedial measures. What was necessary were findings by Congress that the violations to be remedied, and the denial of equal opportunity, were sufficiently weighty to indicate the presence of a nationwide problem.

(ii) In any event, petitioners' assertion that Section 2 is based on a record containing little evidence of voting discrimination outside jurisdictions covered by Section 5 is incorrect. Although the most far-reaching provision of the 1965 Voting Rights Act—the requirement that some States must preclear new voting changes under Section 5 of the Act, 42 U.S.C. 1973c—was supported by voluminous congressional findings of flagrant discriminatory voting practices in the covered jurisdictions, there was evidence of voting discrimination in other regions as well. Subsequent re-enactments and amendments to the Voting Rights Act presented more evidence of such far-flung voting discrimination. See, *e.g.*, H.R. Rep. No. 397, 91st Cong., 1st Sess. 7 (1969).

For example, in 1975, Congress amended the Voting Rights Act after hearings revealed discrimination affecting minority voting participation in areas with large non-English speaking communities and communities with large numbers of American Indians. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 401. See H.R. Rep. No. 196, 94th Cong., 1st Sess. 10 (1975); S. Rep. No. 295, 94th Cong., 1st Sess. 16-17 (1975) (*1975 Senate Report*). Congress expanded the Act to afford protection "to additional areas throughout the country," including localities with concentrations of American Indian voters such as Alaska, Arizona, California, Colorado, Florida, Idaho, Iowa, Louisiana, Mississippi, Nevada, New Mexico, New York,

North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Utah. *1975 Senate Report* 9; 28 C.F.R. Pt. 55 App.

When amending Section 2 in 1982, Congress heard further evidence of persistent abuses of the electoral process nationwide, including "sophisticated dodges, such as at-large elections" that dilute minority voting strength. 127 Cong. Rec. 32,177 (1981); see S. Rep. No. 417, 97th Cong., 2d Sess. (1982) (*1982 Senate Report*); 1 & 2 *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (*1982 Senate Hearings*); H.R. Rep. No. 227, 97th Cong., 1st Sess. 18-20 (1981) (*1981 House Report*); 1-3 *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981). The Attorney General's report to Congress on vote dilution cases during the 1981 hearings included reports on cases outside the South—for example, in Nebraska, Wisconsin, New Mexico, and California. 1 *1982 Senate Hearings* 1804-1806, 1808; see *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1559 (11th Cir. 1984) ("Congress did find evidence of substantial discrimination outside those jurisdictions [covered by § 5 of the Act]."), cert. denied, 469 U.S. 976 (1984).[4] Petitioners'

[4] Petitioners assert (Pet. 15) that the court of appeals relied only on one sentence of the majority Senate Report to hold that there was evidence of widespread discrimination. In fact, the government's brief supplied the court numerous citations to support its conclusion, and the court of appeals referred to those citations in its rejection of petitioners' arguments. See Pet. App. 17, 19-22. Petitioners quote (Pet. 16) from a portion of S. Rep. No. 417, 97th Cong. 2d Sess. (1982) that asserts that there was little evidence of discrimination outside the Southern states presented to Congress. That portion of the report was a report of a subcommittee which, unlike the full committee, recommended

assertion (Pet. 18) that there is a "nonexistent historical record" of the use of discriminatory practices in voting outside the South, including the use of at-large elections, is without merit.

Finally, regardless of whether Congress had before it specific evidence of discrimination affecting voting by American Indians in Montana, the evidence in this case demonstrated that such discrimination had occurred and that it was similar in kind to the evidence on the basis of which Congress had enacted and amended Section 2. Based on "extensive testimony at trial relating to the history of official discrimination against American Indians in the State of Montana and specifically in Blaine County" and other evidence, the trial court found that the government had made out a history of official discrimination in this case. Pet. App. 55. The court of appeals held that the district court's findings regarding the history of discrimination were amply supported. *Id.* at 29-30. Accordingly, there was a sufficient basis to apply Section 2 in this case.

d. Petitioners err in contending (Pet. 14-15) the Ninth Circuit's conclusion that Section 2 is a constitutional application of Congress's enforcement powers conflicts with the Second Circuit's decision in *Muntaqim* v. *Coombe*, 366 F.3d 102, cert. denied, 125 S. Ct. 480 (2004). The issue in *Muntaqim* was whether the "results" test of Section 2 could be applied to invalidate a state law disenfranchising felons.

First, the Second Circuit recently decided to rehear *Muntaqim* en banc. 396 F.3d 95 (2004). Accordingly, it

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against amending Section 2. There is accordingly no reason for taking the subcommittee's comments even as the findings of the Senate committee responsible for the bill—much less as findings reached or endorsed by the Senate as a whole.

cannot be concluded that the panel decision on which petitioner relies states the current view of the Second Circuit.[5]

Second, although the panel in *Muntaqim* concluded that Section 2 does not apply to state felon disenfranchisement statutes (including New York's), 366 F.3d at 130, the panel made quite clear that it "d[id] not purport to decide whether as a general rule the 'results' methodology of § 1973 is constitutionally valid," *id.* at 121. The panel thereby emphasized that it did not intend to invalidate any other applications of Section 2. The panel added that "the courts of appeals that have squarely addressed the issue have concluded that § 1973, on its face, meets the requirements for 'appropriate legislation' under the Fourteenth and Fifteenth Amendments," and the panel stated that "[w]e do not doubt this conclusion." *Ibid.* The panel explained that "[t]he question before us is not whether Congress exceeded its authority when it enacted § 1973; rather, it is whether Congress would exceed its authority if § 1973 were applied to state felon disenfranchisement statutes." *Ibid.* Finally, the panel noted that "felon disenfranchisement statutes cannot be conflated with other facially neutral voting rules that might fall within the ambit of § 1973," and it explained in some detail the basis for that conclusion.[6] *Ibid.* Accordingly, the panel opinion in *Muntaqim*

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[5] The United States recently filed a brief as amicus curiae at the invitation of the court in *Muntaqim*, arguing that Section 2 does not apply to New York's felon disenfranchisement law. See <http://www.usdoj.gov/crt/briefs/muntaqim.pdf>.

[6] Among the reasons the panel gave were an analogy to this Court's conclusion in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), that a provision of the Voting Rights Act prohibiting the disenfranchisement of 18-year-olds in state and local elections was unconstitutional; the support for

does not conflict with the Ninth Circuit's decision in this case, which had nothing to do with felon disenfranchisement.

2. There is no support for petitioners' contention (Pet. 21-24) that the court of appeals held "that Section 2 does not require proof of a minority group's unequal opportunity to participate in the political process." The court of appeals explained that "[i]f the plaintiff establishes the[] three [*Gingles*] factors, the court then must consider whether under the totality of circumstances the at-large voting system operates *to prevent the minority group from participating equally in the political process and electing representatives of its choice.*" Pet. App. 8 (emphasis added). The court also engaged in a careful analysis of the evidence in this case to determine whether it was sufficient to make out a Section 2 violation under that standard. See *id.* at 22-36.

Petitioners argue (Pet. 22) that the court of appeals erred by stating that "the most important Senate Report factors bearing on § 2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized,'" and that other factors "are supportive of, but *not essential to*, a

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disparate treatment of felons with respect to voting in the text of Section 2 of the Fourteenth Amendment, which provides that a State's representation in the House of Representatives will not be reduced because its felons have been disenfranchised; and the "longstanding practice in this country of disenfranchising felons as a form of punishment." 366 F.3d at 122-123. The recent amicus brief filed by the United States in *Muntaqim*, see note 5, *supra*, likewise underscores the uniqueness of the felon disenfranchisement context in arguing that the Voting Rights Act did not extend to the claims at issue there.

minority voter's claim." Pet. App. 35. Suffice it to say, however, that the passage of the court of appeals' opinion that petitioner highlights, including the emphasis, is a quote from this Court's opinion in *Gingles*. See 478 U.S. at 48-49 n.15.

Moreover, although petitioners appear to contend that the court of appeals was attempting to state that proof of the *Gingles* preconditions alone could make out a Section 2 violation "irrespective of the other [Senate] factors," Pet. 22, that was not the point the court was making. Rather, the court of appeals was making the correct legal point that no single factor other than the three *Gingles* preconditions is essential to a showing that Section 2 has been violated. In any event, the court held that the particular factor the court was discussing at that point in its opinion—the history of discrimination—was proven in this case. See Pet. App. 35.

3. Petitioners contend (Pet. 24) that the court of appeals held "that proof of purposeful discrimination is irrelevant." The court of appeals in fact stated that "the County's assumption that intentional discrimination among white voters must be shown is contrary to the plain language of section 2's results test." Pet. App. 28. As this Court itself explained in *Gingles*, the amended Section 2 "dispositively reject[ed]" the contention that Section 2 "required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters." 478 U.S. at 43-44; see *ibid.* ("intent test was repudiated").

Of course, the fact that the amended Section 2 does not require a plaintiff to produce direct proof of intentional discrimination by majority voters does not mean that a governmental electoral structure can be invalidated even though it may be totally divorced from

discriminatory action. A voting practice or procedure can be struck down under Section 2 only if there is proof of its discriminatory operation in the jurisdiction. To prove, as here, that a voting method has discriminatory results, a Section 2 plaintiff alleging vote dilution must not only show the existence of racial bloc voting and a persistent pattern of majority voters collectively preventing the election of minority-preferred candidates, *Gingles*, 478 U.S. at 44-45, but also must prove some of the additional circumstances described by the Senate factors that demonstrate that there are effects of discrimination that affect voters in that jurisdiction. *Ibid.* Both courts below found that the plaintiffs had carried that burden on the facts of this case.

Contrary to petitioners' contention (Pet. 26), the court of appeals' conclusion that plaintiffs in a Section 2 case need not introduce direct evidence of discriminatory motivation by majority voters does not conflict with the decisions in *League of United Latin American Citizens* v. *Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), or *Nipper* v. *Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995). In *Clements*, for example, the Fifth Circuit agreed with the court of appeals in this case that, in amending Section 2, "Congress intended 'to make clear that proof of discriminatory intent is not required to establish a violation of Section 2.'" 999 F.2d at 849 (quoting *1982 Senate Report* 2).

In *Nipper*, the Eleventh Circuit did state that "if the evidence shows * * * that the community is not motivated by racial bias in its voting patterns, then a case of vote dilution has not been made." 39 F.3d at 1515. But the court in *Nipper* also explained that "[p]roof of the second and third *Gingles* factors—

demonstrating racially polarized bloc voting that enables the white majority usually to defeat the minority's preferred candidate—is circumstantial evidence of racial bias operating through the electoral system to deny minority voters equal access to the political process." *Id.* at 1524. Indeed, the court in *Nipper* concluded that "the existence of [the second and third *Gingles* factors], and a feasible remedy, generally will be sufficient to warrant relief." *Ibid.* Thus, the Eleventh Circuit too agreed that a Section 2 plaintiff may prevail without direct proof of intentional discrimination by non-minority voters.

4. Finally, petitioners contend (Pet. 27) that the court of appeals held "that whether minority groups possess unique or distinctive political interests is irrelevant" in determining whether the second *Gingles* factor —the political cohesiveness of minority voters—has been proven. What the court actually said was that "it is actual voting patterns, not subjective interpretations of a minority group's political interests, that informs the political cohesiveness analysis." Pet. App. 24.

The court of appeals' standard follows from *Gingles*. This Court found minority voters in *Gingles* politically cohesive based on their support for candidates that ranged from 71% to 96% and stated that "[a] showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim." *Gingles*, 478 U.S. at 56, 59. The court of appeals followed the same path here, relying on the fact that experts for both the United States and the County testified that American Indians voted cohesively for the same candidates in local and county elections. Pet. App. 23; see also *id.* at 47-48. Other circuits similarly have

held that reliance on the voting patterns of minority voters can be sufficient to determine whether they vote cohesively. *Uno* v. *City of Holyoke*, 72 F.3d 973, 982-983 (1st Cir. 1995); *Cane* v. *Worcester County*, 35 F.3d 921, 926 (4th Cir. 1994), cert. denied, 513 U.S. 921 (1995); *Monroe* v. *City of Woodville*, 897 F.2d 763, 764 (5th Cir.), cert. denied, 498 U.S. 822 (1990); *Harvell* v. *Blytheville Sch. Dist.*, 71 F.3d 1382, 1386-1388 (8th Cir. 1995), cert. denied, 517 U.S. 1233 (1996); *Old Person* v. *Cooney*, 230 F.3d 1113, 1121 (9th Cir. 2000); *Sanchez* v. *Colorado*, 97 F.3d 1303, 1315-1322 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997); *Solomon* v. *Liberty County*, 899 F.2d 1012, 1019-1020 (11th Cir. 1990), cert. denied, 498 U.S. 1023 (1991).

Contrary to petitioners' contention (Pet. 28), the court of appeals' decision does not conflict with *Sanchez* v. *Bond*, 875 F.2d 1488, 1493-1494 (10th Cir. 1989), cert. denied, 498 U.S. 937 (1990). In *Sanchez*, the court stated that "[i]t is clear from *Gingles* that a showing that a significant number of minority group members usually vote for the same candidates can establish the requisite political cohesiveness under § 2" and that "[t]he reasons why minority voters may vote alike is unimportant in determining whether in fact the minority group votes as a bloc." *Id.* at 1493. That is entirely consistent with this Court's decision in *Gingles*, the decision of the court of appeals in this case, and the decisions of other courts of appeals cited above. The court in *Sanchez* went on to state that a trial court is not "*prohibited* from considering lay testimony in deciding whether a minority group is politically cohesive" because "[t]he experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically

cohesive." *Id.* at 1493-1494. There is no conflict between the court's conclusion in *Sanchez* that the district court did not "violate the standards of *Gingles*" in considering such evidence, *id.* at 1494, and the court of appeals conclusion in this case that such evidence was not necessary, see Pet. App. 24.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

R. ALEXANDER ACOSTA
Assistant Attorney General

MARK L. GROSS
LISA WILSON EDWARDS
Attorneys

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No. 04-775

In The
Supreme Court of the United States

BLAINE COUNTY, MONTANA; DON K. SWENSON, ARTHUR KLEINJAN, and MARY DELORES PLUMAGE, in their official capacities as members of the Blaine County Board of Commissioners; and SANDRA BOARDMAN, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County,

Petitioners,

v.

UNITED STATES of America,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BLAINE COUNTY'S REPLY TO THE RESPONSE OF THE UNITED STATES

J. SCOTT DETAMORE, ESQ.
Counsel of Record
WILLIAM PERRY PENDLEY, ESQ.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. The U.S.'s Defense of the Ninth Circuit's Constitutional Holdings Fails.

The U.S. argues that *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984), is dispositive of Section 2's constitutionality because *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny, including *Tennessee v. Lane*, 124 S.Ct. 1978 (2004) (*Boerne* through *Lane*), do not employ a constitutional analysis different from that employed in *Brooks*. U.S. at 12-13.[1] The U.S. supports this extraordinary conclusion by observing only that *Boerne* through *Lane* have "consistently cited *various provisions* of the Voting Rights Act [VRA] as the 'prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments.'" U.S. at 12 (emphasis added).[2] However, none of these cases relied upon the legislative history considered by Congress when it enacted Section 2 in 1982. Rather, the "various provisions" were only two: (1) Section 5 of the VRA, adopted in 1965, which involved only a handful of Southern States that engaged in all manner of unconstitutional voting discrimination; and (2) Section 201 of the VRA, adopted in 1970 and extended in 1975, which involved nationwide use of discriminatory literacy tests to prevent minority registration. Moreover, because Section 2 was made prophylactic in 1982,[3] any references in *Boerne*

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[1] The U.S. overlooks that *Brooks* is inapposite because it involved a facial challenge, quite unlike Blaine County's much narrower as-applied challenge.

[2] *See also* U.S. 14, n.3: "[A]s the Court has developed *Boerne's* 'congruence and proportionality test' standard in later cases, the Court has continued to refer to various provisions of the Voting Rights Act as examples of constitutional exercises of Congress' power."

[3] Prior to 1982, Section 2 prohibited only unconstitutional conduct. *City of Mobile Alabama v. Bolden*, 446 U.S. 55, 65 (1980).

through *Lane* to the factual predicates for "various provisions" of the VRA, adopted in 1965, 1970, and 1975, are of no value with respect to Section 2. Section 2 may not be held constitutional simply because two other prophylactic sections of the VRA have been found congruent and proportionate to the legislative history supporting them.

The U.S., like the Ninth Circuit, states that Blaine County's challenge is without merit because "the amended Section 2 is constitutional even though it does not require direct proof of discriminatory intent in adopting or maintaining at-large elections," citing *Lane*. U.S. at 13-14. The U.S. attacks a strawman. Instead, Blaine County argues that *Boerne* through *Lane* very narrowly proscribe the authority of Congress to adopt prophylactic legislation like Section 2 and that Congress exceeded that authority because Section 2 is not congruent and proportionate to the historical record purportedly relied upon by Congress. Blaine County at 8-11.

The U.S., like the Ninth Circuit, states that Blaine County's challenge is without merit because Congress need not have evidence of unconstitutional voting discrimination in every State before enacting prophylactic legislation, citing *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). U.S. at 14-15, 17. Again, the U.S. attacks a strawman. Instead, Blaine County argues that the proper factual predicate of unconstitutional voting discrimination must be found in "the States" or "most states." Blaine County at 10. Such a factual predicate demonstrates that the problem addressed by Congress is national in scope, not simply regional, such as a "problem" found in only covered jurisdictions. Findings of

voting discrimination by governments in only covered jurisdictions may not be used to justify expanding Section 2 to the remainder of the nation. The U.S. attempts to overcome this fatal defect by alleging that "there was evidence of voting discrimination in other regions as well." U.S. at 16. However, the U.S., like the Ninth Circuit, fails to substantiate this conclusory allegation.[4]

The U.S. attempts to overcome the lack of a factual predicate for Section 2 by claiming that the "government's brief supplied the court [with] numerous citations" to the legislative record on which the Ninth Circuit relied. U.S. at 17, n.4. These citations contain no references to evidence of unconstitutional voting discrimination outside of covered jurisdictions. Instead, they disclose only that Congress was dissatisfied with this Court's holding, in *Bolden*, that a Section 2 claim requires proof of unconstitutional voting practices because such proof is difficult, divisive, and unfair.

The U.S. then cites to a handful of Congressional Reports and Hearings, but fails to point out a single passage that demonstrates the existence of unconstitutional voting discrimination anywhere. U.S. at 17. Blaine

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[4] For example, the U.S. represents that Congress expanded the coverage of Section 5 to a number of additional States, including Colorado, Idaho, Iowa, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, and Utah. *Id.* Blaine County notes that these States were never covered by Section 5 preclearance provisions, nor was there ever a finding by Congress that widespread patterns of unconstitutional voting discrimination existed in those States. Perhaps the U.S. refers to the fact that, in 1975, some States or isolated counties therein, which possessed a prescribed number of non-English speaking voters, were required to print ballots in languages other than English to accommodate these non-English speaking voters. These jurisdictions were not covered by Section 5 preclearance.

County's own examination of these materials has revealed only a very few isolated incidences of alleged unconstitutional voting discrimination outside of covered jurisdictions, which fail to satisfy congruency and proportionality as required by *Boerne* through *Lane*.

The U.S. argues that a Subcommittee report relied upon by Blaine County is entitled to no credence because it "recommended against amending Section 2." U.S. at 17-18, n.4. The U.S. may not summarily dismiss the conclusion of the Subcommittee on the Constitution that "the subject of voting discrimination outside the covered jurisdictions has been virtually ignored during the hearings in each chamber," Sen. Rep. 97-417 at 171, without pointing to evidence that refutes the Committee's conclusion. The U.S. provides no such evidence.

The U.S., unable to meet the requirements of *Boerne* through *Lane*, fashions from whole cloth a previously unknown constitutional justification, neither addressed nor adopted by the District Court or the Ninth Circuit, for applying Section 2 to Blaine County:

> [R]egardless of whether Congress had before it specific evidence of discrimination affecting voting by American Indians in Montana, the evidence in this case demonstrated that such discrimination had occurred and that it was similar in kind to the evidence on the basis of which Congress had enacted and amended Section 2.

U.S. at 18. This Court requires that Congress have evidence of unconstitutional voting discrimination before it enacts prophylactic legislation, not thereafter, as the U.S. now argues for the first time. The U.S.'s novel theory is without merit and precedential support. Moreover, the U.S. does not suggest that it has evidence that Montana's at-large voting was adopted or maintained to discriminate

purposefully, which is the only factual predicate relevant under *Boerne* through *Lane*.

The U.S. attempts to discredit Blaine County's Petition by pointing out that *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 480 (2004), did not hold Section 2 facially unconstitutional. U.S. at 19. Yet again, the U.S. attacks a strawman. Blaine County cited *Muntaqim* because it held that "by enacting Section 2, [Congress] chose a blunt tool. . . ." *Id.* at 124-125. Thus, *Muntaqim* held that, as applied to felony disenfranchisement laws, Section 2 is constitutionally "too attenuated" because its application to those laws, like its application to at-large voting laws, applies to "*any* law enacted at *any* time in *any* state that 'results' in the abridgement of the right to vote." *Id.* at 125 (emphasis in original). While the Second Circuit has granted rehearing *en banc* after denial of *certiorari*, *Muntaqim*, 396 F.3d 95 (2nd Cir. 2004), the panel's reasoning is still persuasive.

Thus, the U.S. fails to provide this Court with any constitutional, legal, or factual basis upon which to deny this Petition. Therefore, this Court should grant Blaine County's Petition to determine the constitutionality of Section 2 as applied to at-large voting in non-covered jurisdictions.

II. The U.S. Fails to Address Many Constitutional Errors of the Ninth Circuit.

The U.S. does not address Blaine County's arguments and reasons for granting its Petition as set forth in the following Sections thereof: Section I(B) at 7-8; Section II(C)(1) at 11; Section II(C)(3) at 13-15; and Section II(D) at 18-19. These reasons provide a sufficient basis for granting Blaine County's Petition.

III. The U.S. Must Prove Intentional Discrimination Interferes With a Minority Group's Ability Both to Participate and to Elect.

The gravamen of a Section 2 claim is the existence of intentional discrimination, past or present, public or private, that causally interacts with at-large election systems to produce an unequal ability of minority voters both to participate in the political process and also to elect candidates of choice. *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973); and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), upon which cases Section 2 was modeled. Out of these requirements grew the 9 Senate Factors.

The U.S. argues that Section 2 does not require proof that Blaine County adopted or maintained at-large voting to discriminate against minority voters. U.S. at 21. Still again, the U.S. attacks a strawman. Blaine County argues that the U.S. must demonstrate that invidious discrimination, public or private, past or present, interacting with at-large voting, interfered with the ability of minority voters both to access the political process and also to elect candidates of choice, as required by *Whitcomb*, *White*, and *Zimmer*. The Ninth Circuit, to the contrary, held that Section 2 requires only proof of the unequal ability of a minority group to elect its candidates due to racially polarized voting, without any reference to discrimination and without reference to the group's ability to participate in the electoral process.[5] This holding conflicts with the

[5] The Ninth Circuit held: "Proof of groupwide or individual discriminatory motives has no part in a [Section 2] vote dilution claim," because any proof of "intentional discrimination among white voters is contrary to the plain language of Section 2[ ]. . . ." "We reject the notion

(Continued on following page)

decisions of this Court and with the majority of other circuits, as set out in Blaine County's Petition. Blaine County at 21-29.

The U.S. and Ninth Circuit attempt to bootstrap *Thornburg v. Gingles*, 478 U.S. 39 (1986), into something it is not, ignoring that the primary focus of *Gingles* was to determine what Senate Factor 2 meant, how it was to be determined, and the penalty for failing to prove it.[6] *Gingles* held only that, if Senate Factor 2 is not established through the three "*Gingles* factors," the case should be dismissed without proceeding to an analysis of the other factors. However, the Ninth Circuit held, and the U.S. argues, that only Senate Factors 2 and 7 are necessary to prove a Section 2 claim. App. at 10, 28, 35-36; U.S. at 21-23. This Court has held to the contrary, that the remaining 7 factors must be considered, along with any other relevant circumstance, in examining the impact of intentional past or present discrimination on access to the political process and as causation for Senate Factor 2. *De Grandy*; *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Whitcomb*; and *White*. Proof of Senate Factors 2 and 7 only avoids early dismissal, but it may not alone result in a finding of a Section 2 violation.

While the Ninth Circuit held and the U.S. argues that proof of discrimination, or an unequal ability to participate in the electoral process, is unnecessary in a Section 2

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that the district court was required to unearth evidence of discrimination in the white electorate." App. at 28. *Whitcomb*, *White*, *Johnson v. De Grandy*, 512 U.S. 997 (1994), and *Zimmer*, as well as the decisions of several circuits set out in Blaine County's Petition at 25-27 and note 15, hold otherwise.

[6] Senate Factor 2 is the "extent to which voting . . . is racially polarized."

case,[7] they observe that, if proof is necessary, some evidence of discrimination was introduced at the District Court. App. at 29-30; U.S. at 6-7, 21. They do not state that the District Court made a finding that this discrimination is connected causally to any of the Senate Factors or to present day alleged unequal access to the electoral process or unequal ability to elect candidates of choice.[8] Moreover, the few conclusory statements regarding discrimination made by the District Court,[9] vigorously contested by the parties, were brushed aside by the Ninth Circuit as unnecessary in any event, because such evidence is "not critical" and "not essential." App. at 28. This

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[7] The U.S. equivocates on this issue, trying to recharacterize the Ninth Circuit's unqualified holding. U.S. at 21. However, the Ninth Circuit's holding speaks for itself. App. at 10, 28, 34-36.

[8] The Ninth Circuit referred only to a handful of Montana Statutes, all of which were repealed by 1924, none of which were relevant because American Indians could not vote until made citizens in 1924. App. at 29-30. The remaining statutes, unremarkably, limited voting to property owners; the last of these statutes was repealed by 1963. *Id.* Importantly, none of these statutes impeded American Indian voting for candidates. There was no finding, nor has the U.S. suggested, that any of these statutes has any present impact on American Indian access to the political process or ability to elect candidates.

The only other evidence mentioned was found not in this case, but in another to which neither the U.S. nor Blaine County was a party, and in which discrimination was stipulated, not hotly contested as here. App. at 29.

Though the District Court did not discuss the testimony presented by the United States' two expert witnesses, the Ninth Circuit did. That discussion reveals that there was no evidence admitted concerning any alleged discrimination after 1959! App. at 35, n.28. Nearly all evidence concerned purported discrimination prior to 1930. App. at 29.

[9] A reading of that opinion demonstrates that there was no discussion of the facts upon which the conclusions were based, and no discussion whatsoever of the extensive facts presented by Blaine County to the contrary.

Court has held otherwise in *Whitcomb*, *White*, *De Grandy*, and *Georgia v. Ashcroft*, *supra*.

IV. The U.S. Must Demonstrate an Addressable, Unique Minority Group Interest.

The Ninth Circuit held that bloc voting alone is determinative of political cohesion without regard to the existence of addressable, unique minority group interests. App. at 24. The U.S. and the Ninth Circuit ignore that *Whitcomb* and *Gingles* require identification of distinctive or unique minority group interests for a finding that a minority group has demonstrated political cohesion. *Whitcomb* even identified many of the "unique" interests that must be present. *Id.* 403 U.S. at 135 n.12.

While the U.S. suggests that the District Court found such distinctive interests, U.S. at 5, it argues that such interests are irrelevant. U.S. at 23-25. Moreover, the District Court did not identify a single such interest, did not discuss why such an interest was unique, and did not explain how Blaine County could address it. App. at 47. Moreover, the District Court did not discuss Blaine County's considerable contrary evidence.

The U.S. strains to distinguish *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989). U.S. 24. To be sure, *Bond* did find that the "reasons minority voters may not vote alike is unimportant." However, the Tenth Circuit was not, as the U.S. implies, addressing political cohesion. *Id.* at 1493. Rather, it was addressing only the limited question of "whether . . . the minority group votes as a bloc." *Id.* The Tenth Circuit recognized that, while bloc voting may "indicate[] political cohesion," *id.*, additional testimony concerning motivation is "required if the court is to identify the presence or absence of distinctive minority group

interests." *Id.* at 1494. The U.S. omitted this last sentence. The U.S. also fails to distinguish or address this Court's holdings in *Whitcomb*; *Gingles*; or *N.A.A.C.P. v. City of Columbus*, 850 F.Supp. 404 (D. S.C. 1994), *aff'd as modified on other grounds*, 33 F.3d 52 (4th Cir. 1994) (*per curiam*); all requiring the presence of addressable, distinctive minority group interests for a finding of political cohesion even if bloc voting were proved.

The U.S.'s attempt to characterize *Old Person v. Cooney*, 230 F.3d 1113 (9th Cir. 2000), as supportive of its position, is unfounded. U.S. at 24. *Old Person* supports Blaine County's position. *See* Blaine County at 28. Furthermore, *Sanchez v. State of Colorado*, 97 F.3d 1303 (10th Cir. 1996), does not support the Ninth Circuit's position, as claimed by the U.S. U.S. at 24. Rather, it, like *Gingles* and *Whitcomb*, requires that at-large voting must "thwart[] distinctive minority group interests." *Id.* at 1312.[10]

CONCLUSION

This Court should grant Blaine County's Petition.

Respectfully submitted,

J. SCOTT DETAMORE, ESQ.
Counsel of Record
WILLIAM PERRY PENDLEY, ESQ.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioners

[10] While *Sanchez*, 97 F.3d at 1312, purports to distinguish *Bond*, *Sanchez* simply ignores the clear language of *Bond*, which speaks for itself. *Bond*, 875 F.2d at 1494.